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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 358

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

RECORD ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.
744 Broad Street,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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APPENDIX TO APPELLANTS' BRIEF.

Relevant Docket Entries.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

EMIL STEIN and WILLIAM B. STEIN, *et als.*, Plaintiffs, *vs.* PRESTON DELANO, Comptroller of the Currency, *et als.*, Defendants.	Civil 829.

1940

Mar. 2. Complaint filed.

Mar. 4. Order to show cause for relief filed.

Mar. 18. Hearing on order to show cause for relief. Decision reserved. Hearing on motion to dismiss action as to E. Lorry Keeton, Receiver. Decision reserved.
Hearing on motion for special appearance on behalf of defendant Preston Delano, Comptroller and to quash service of summons. Decision reserved.

Mar. 18. Order granting intervention of Walter H. Cole and Frank W. Miller filed.

Aug. 12. Order permitting Edward M. Waldron *et al.* to intervene, filed.

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Aug. 12. Order permitting Harvey G. Reddan and John I. Spooner to Intervene, filed.

Aug. 26. Order allowing intervention of John F. Monahan and Frank J. McCann, filed.

Oct. 16. Memorandum filed. (Walker, *J.*)

Oct. 21. Order allowing intervention of Federal Trust Co. and Lawyers' Title Guaranty Co. of N. J. filed.

Nov. 18. Order of substitution of defendant receiver, filed.

Nov. 18. Order of substitution of intervening plaintiff filed.

Nov. 25. Order quashing service and dismissing bill of complaint filed.

Dec. 2. Notice of appeal, filed.

Dec. 2. Bond on appeal, filed.

Dec. 10. Stipulation made by E. Lorry Keeton, Receiver, in open Court on March 18, 1940.

Dec. 10. Stipulation designating record on appeal.

Complaint.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

EMIL STEIN and WILLIAM B. STEIN, Plaintiffs, *vs.* PRESTON DELANO, Comptroller of the Currency, and E. LORRY KEETON, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey, Defendants.	Civil Action. Complaint.

Plaintiffs, stockholders of the New Jersey National Bank and Trust Company of Newark, New Jersey, on behalf of themselves, the New Jersey National Bank and Trust Company of Newark, New Jersey, (a National Banking Association organized under the laws of the United States of America) and all other stockholders thereof similarly situated, complaining of the defendants, say that:

1. This action arises under the United States Code, Title 12, Chapter 2, as hereinafter more fully appears, to enjoin the Comptroller of the Currency and a receiver acting under his direction as provided by said chapter.

2. The New Jersey National Bank and Trust Company of Newark, New Jersey, was and is a National Banking Association organized and existing under the laws of the United States of America, having its principal place of

business in the City of Newark, County of Essex, and State of New Jersey, and in the District of New Jersey.

3. The plaintiff, Emil Stein, prior to June 11, 1932 and ever since has been and still is the owner and holder of one hundred and nineteen (119) shares of the capital stock of the New Jersey National Bank and Trust Company of Newark, New Jersey.

4. The plaintiff, William B. Stein, prior to June 11, 1932 and ever since has been and still is the owner and holder of ninety, (90) shares of the capital stock of the New Jersey National Bank and Trust Company of Newark, New Jersey.

5. On or about June 11, 1932, the then Comptroller of the Currency, acting pursuant to the authority vested in him under 12 U. S. C. Sections 191 and 192, appointed Chester P. Rogers receiver of the said New Jersey National Bank and Trust Company of Newark, New Jersey, who qualified and acted as such receiver until on or about May 19, 1938, when he resigned; thereupon, Joseph O'Shaughnessy was appointed his successor, qualified and acted as such until on or about September 23, 1939, at which time he resigned; whereupon E. Lorry Keeton, one of the defendants herein, was appointed his successor, and he qualified and has been and still is acting as such receiver.

6. From time to time, after full provision had first been made for refunding to the United States of America any deficiency in redeeming the circulating notes of said association, the defendant, Preston Delano, who is the Comptroller of the Currency of the United States of America, and his predecessors in office paid dividends on all claims previously proved or adjudicated as required under the terms and provisions of 12 U. S. C. Sec. 194.

7. The defendant, Preston Delano, Comptroller of the Currency as aforesaid, and his predecessors in office have

made provision for the payment of, or have paid out of the monies turned over to said defendant Comptroller and his predecessors in office, by the defendant receiver and his predecessors in office, one hundred per cent on all claims of creditors of said association, which had been proved to the satisfaction of said defendant receiver and his predecessors in office, or adjudicated in a court of competent jurisdiction, (but not including shareholders who are also creditors of said association); and said defendant Comptroller has paid or has in his possession, sufficient monies out of which to pay the expenses of the receivership of the said association.

7a. In connection with and prior to the payment to the former creditors of said association of one hundred per cent of their claims as hereinbefore set forth, an assessment of one hundred per cent upon all the outstanding capital stock of $2,800,000.00 of said association was levied by the Comptroller of the Currency, and plaintiffs allege, upon information and belief, that upwards of $1,000,000.00 has been paid to the defendant receiver and his predecessors in office thereon by the shareholders of said association.

8. Pursuant to 12 U. S. C. Sections 192 and 194, the assets now in the possession of the defendant Comptroller are payable to the shareholders of said association or their legal representatives in proportion to the stock respectively by them held, and it is the duty of the defendant Comptroller, pursuant to 12 U. S. C. Sec. 197, to call a meeting of the shareholders of said association for the purpose of determining whether the defendant receiver shall be continued and shall wind up the affairs of said association or whether an agent shall be elected for such purpose of said shareholders—in either of which instances, the person selected by the shareholders is accountable to this Court, and not the Comptroller of the Currency, for his conduct in the administration of the trust estate.

9. Defendant Comptroller has refused to call a meeting of the shareholders of said association for the purposes mentioned in the preceding paragraph, in order that the assets now in the possession of the defendants might be paid over to said shareholders or their legal representatives in proportion to the stock by them respectively held; and notwithstanding formal, written demand therefor has been made upon the office of the said Comptroller, the defendants insist upon their alleged right to continue in possession of the assets of said association and to wind up its affairs for the sole purpose of paying to the former creditors of said association interest upon their respective claims.

10. The alleged interest upon the claims of the respective former creditors, for which defendants are insisting upon their right to continue in possession of said assets does not constitute a valid, legal and subsisting obligation of the said association, and the actions of said defendants in that respect are illegal, unlawful, and prejudicial to the interests of plaintiffs and the association, and all of the other shareholders thereof.

11. Unless this Court intervenes and enjoins said defendants from continuing in possession of the assets of said association for the purpose of winding up its affairs and paying interest to the former creditors thereof upon their respective claims, defendants, in accordance with their expressed intentions, will make such payments of interest from time to time, and the recovery back from said various payees by the shareholders of said association will involve a multiciplicity of suits and the expenditure of tremendous sums of money, all to the irreparable damage of plaintiffs, the association, and all the other shareholders thereof.

12. Plaintiffs are informed and verily believe that the monies and other assets of said association not yet liquidated, in the possession of defendants, amount to upwards

of $750,000.00, and if defendants are permitted to carry out their expressed intentions of paying said funds to former creditors of the association as interest upon their respective claims, plaintiffs, the association and the other shareholders thereof will have been deprived of said fund which is rightfully theirs, and their sole recourse will be to attempt to recover back payments from said former creditors, all of which will involve exorbitant expense and the institution of multifarious suits, the ultimate result and success of which is and will be extremely doubtful.

13. Notwithstanding the fact that plaintiffs, the association, and the other shareholders thereof are presently the equitable owners of the assets of said association, defendants threaten to continue the liquidation of the association's remaining assets for the sole purpose of paying the interest as aforesaid, all of which said acts, plaintiffs charge to be unwarranted and illegal, and an abuse of the power vested in them by law; and for the method, manner, and expense involved in their conduct in that respect defendants are and will be accountable to no one.

14. The assets of said association now in the possession of defendants constitute a trust fund for the benefit of the association and all the stockholders thereof, and defendants have no further legal or equitable claim or interest therein.

15. In order to preserve the assets of said association, constituting the trust estate for the benefit of plaintiffs, the association, and all the other shareholders thereof, and in order to control the expense of management thereof until defendant Comptroller shall have called the shareholders' meeting pursuant to 12 U. S. C. Sec. 197, and the agent of the shareholders shall have been elected, this Court should take said assets into its custody by appointing a receiver or receivers, trustee or trustees, thereof who shall be accountable to it for all actions with respect to said trust estate until the further order of this Court.

16. Plaintiffs are informed and verily believe that defendant receiver is presently engaged in the maintenance of various expensive legal proceedings, and is continuing the employment of a staff of employees, agents, and attorneys at the expense of said trust estate, a great part of which would be avoided by the appointment of a receiver or receivers, trustee or trustees by this Court, to devote his or their time exclusively to the liquidation of said assets, and the administration of said trust estate, in place and stead of the said defendant receiver who is presently engaged as receiver of approximately six other institutions, among all of which his time and efforts are of necessity divided.

17. Plaintiffs were shareholders of said association at the time of all the transactions referred to herein, and this action is not a collusive one to confer on a Court of the United States of America jurisdiction of any action of which it would not otherwise have jurisdiction.

18. Plaintiffs have been unable to secure from the managing directors of said association the action which they desire, due to the fact that since the appointment of a receiver of said association on or about June 11, 1932, there have been no managing directors or executive officers in charge of said association, the defendant receiver and his predecessors in office having at all times since June 11, 1932 assumed complete charge of all of the affairs of said association; and plaintiffs' requests and demands of the defendants as hereinbefore set forth, have proved futile and unavailing, and said defendants have refused to comply with plaintiffs' requests and demands.

19. Plaintiffs are without other adequate remedy to prevent the threatened illegal and unconstitutional acts of defendants in depriving the association and all of its shareholders of the assets of said association.

20. If this Honorable Court does not enjoin defendants from carrying out their expressed threats to apply the assets of the New Jersey National Bank and Trust Company of Newark, New Jersey toward the payment of interest upon the claims of former creditors of the said association, there exists no adequate remedy at law to protect the constitutional and property rights of the said association and all its shareholders.

WHEREFORE, plaintiffs pray:

1. That the Court order this cause to be heard upon application for a preliminary injunction, (which is hereby made) and that the Court upon such application and hearing issue a preliminary injunction, pending the trial of this cause, the outcome thereof, and the further order of this Court:

(a) enjoining the said defendant Preston Delano, Comptroller of the Currency, and the said defendant E. Lorry Keeton, receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, from further retaining possession of the assets of said association, and from winding up its affairs, and from taking any action whatever with respect thereto or to the payment of interest upon claims of former creditors of said association;

(b) appointing a receiver or receivers, trustee or trustees of the assets of the New Jersey National Bank and Trust Company of Newark, New Jersey, as a trust estate for the benefit of the association and all the shareholders thereof.

2. That upon final hearing of this cause, the Court order, adjudge and decree:

(a) that the defendant, Preston Delano, Comptroller of the Currency, and the defendant, E. Lorry Keeton, receiver of the New Jersey National Bank

and Trust Company, of Newark, New Jersey, be permanently enjoined from further retaining possession of the assets of said association, and from winding up its affairs, and from taking any action whatever with respect to the payment of interest upon claims of former creditors of said association;

(b) that the defendant, Preston Delano, Comptroller as aforesaid, be ordered to forthwith call a meeting of the shareholders of the New Jersey National Bank and Trust Company of Newark, New Jersey, in the manner and form, and for the purpose specified and set out in 12 U. S. C. Sec. 197;

(c) that it be declared and decreed that interest upon obligations held by former creditors of the said association be not a valid, legal and subsisting obligation of the said association to the end that all of the assets of said association be distributed among the shareholders of said association, pursuant to 12 U. S. C. Sec. 197 without any deduction therefrom for interest alleged to be due upon the said claims of former creditors.

(d) that it be declared and decreed that the assets of said association now in the possession of defendants constitute a trust fund for the benefit of the association and all the shareholders thereof, and that defendants have no further legal or equitable claim or interest therein.

3. That the defendants account to this Court for their acts and conduct while in possession of the assets of said association since the declaration of the final dividend completing the payment of one hundred per cent. upon the claims of the former creditors of said association.

4. That plaintiffs be reimbursed for their costs, expenses and counsel fees in prosecuting this suit.

5. That the plaintiffs have such other, further, and general relief as the nature of the case may require and the Court may deem just and proper in the premises.

Dated March 1, 1940.

KRISTELLER & ZUCKER,
(Signed) By SAUL J. ZUCKER,
A member of the firm.
Attorneys for Plaintiffs,, Office and Post Office Address, 744 Broad Street, Newark, New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

WILLIAM B. STEIN, being duly sworn on his oath, according to law, deposes and says:

I reside in the City of East Orange, County of Essex and State of New Jersey; I am one of the plaintiffs above named; I have read the foregoing complaint and know the contents thereof, and the same are true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

WILLIAM B. STEIN.

Subscribed and sworn to before me }
this 1st day of March, 1940. }

MILTON LOWENSTEIN,
A Master in Chancery of New Jersey.

Order to Show Cause.

Upon reading and filing the duly verified complaint of Emil Stein and William B. Stein, plaintiffs in the above entitled cause, and good cause appearing therefor, it is on this 4th day of March, Nineteen Hundred and Forty, on motion of Kristeller & Zucker, attorneys of said plaintiffs,

ORDERED, That Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company, of Newark, New Jersey, show cause before this Court, on Monday, the 18th day of March, Nineteen Hundred and Forty, at the United States District Court Rooms, Post Office Building, Federal Square, Newark, New Jersey, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard,

(1) Why the relief prayed for in the complaint should not be granted, and

(2) Why the said Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company, of Newark, New Jersey, should not, pending the final hearing in this cause, the outcome thereof and the further order of this Court, be enjoined from further retaining possession of the assets of the New Jersey National Bank and Trust Company, of Newark, New Jersey, or from taking any action with respect thereto, and especially with respect to the payment of interest upon the claims of the former creditors of said Association, and

(3) Why a receiver or receivers, trustee or trustees, should not be appointed of the assets of the New Jersey National Bank and Trust Company, of Newark, New Jersey, pending the final hearing in this cause, the outcome thereof, and the further order of this Court; and it is further

ORDERED, That answering affidavits of the defendants, if any, to be used upon the argument of this order to show cause, be served upon the plaintiffs, or their attorneys, at least 5 days before the return date hereof; and it is further

ORDERED, That plaintiffs have leave to file such reply affidavits upon the argument as they shall be advised are proper; and it is further

ORDERED, That a copy of this order and a copy of the summons and verified complaint herein be served upon the defendants in accordance with the provisions of the Rules of Civil Procedure for the District Courts of the United States, at least 10 days before the return date hereof.

THOMAS GLYNN WALKER,
U. S. D. J.

Notice of Special Appearance and of Motion to Quash Process.

To Kristeller & Zucker, attorneys for plaintiffs:

PLEASE TAKE NOTICE, that on Monday, March 18, 1940, at 10:30 o'clock, or as soon thereafter as counsel can be heard, at the Federal Building, Newark, New Jersey, we shall apply to the Court for leave to enter a special appearance on behalf of the defendant Preston Delano, Comptroller of the Currency, for the purpose of objecting to the exercise of jurisdiction herein by this Court, and moving to quash the service of summons attempted to be made upon him, on the grounds that said Preston Delano is a resident, citizen and inhabitant of the District of Columbia, that he is not, and was not, subject to service of process within the District of New Jersey, and has not, as will appear from the return of said summons, been properly served with

process in this action, and that the attempt to serve him in the District of Columbia with process herein is without authority of law, and that this case is not one which comes within the provisions of section 57 of the Federal Judicial Code.

AND TAKE FURTHER NOTICE, that, appearing specially as aforesaid, we shall also move to dismiss the bill of complaint herein as to said Preston Delano, Comptroller of the Currency, on the ground that this Court has not acquired jurisdiction over him as defendant, or over the subject matter of this action, and that this case is not one which comes within the provisions of section 57 of the Judicial Code so as to give this Court jurisdiction over the defendant or over the subject matter of this action.

J. H. HARRISON,
Appearing specially for the Defendant, Preston Delano, Comptroller of the Currency, for the purposes of the aforesaid motions only.

Dated: Newark, New Jersey,
March 12th, 1940.

Notice of Motion to Dismiss.

To Kristeller & Zucker, Attorneys for Plaintiffs:

PLEASE TAKE NOTICE, that on Monday, March 18, 1940, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Federal Building, Newark, New Jersey, we shall apply to the Court for a motion to dismiss the action against E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark,

because the complaint fails to state a claim against him upon which relief can be granted.

J. H. Harrison,
Attorney for Defendant, E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark.

Dated: Newark, New Jersey,
March 12th, 1940.

Affidavit.

State of New Jersey, }
County of Essex. } ss.:

E. Lorry Keeton, of full age, being duly sworn according to law, upon his oath deposes and says:

I am Receiver of New Jersey National Bank and Trust Company of Newark, N. J., and one of the defendants in the above entitled action.

William B. Stein, one of the plaintiffs in this action, is indebted to me, as Receiver of said New Jersey National Bank and Trust Company of Newark, on three promissory notes, as follows:

On a note dated June 3, 1932, maturing three months after date, in the original principal sum of $1,350.00, for a principal balance of $561.31 and accrued interest on the reducing balances of said note from September 6, 1932.

On a note dated March 30, 1932, maturing three months after date, in the original principal sum of $1,700., for a principal balance of $800.00 and accrued interest on the reducing balances of said note from June 30, 1932.

On a note dated March 18, 1932, maturing three months after date, in the original principal sum of $23,300., for a principal balance of $11,989.72 and accrued interest on the reducing balances of said note from June 20, 1932. Said William B. Stein is also indebted to me, as Receiver as aforesaid, for a principal balance of $2,245.00 on a stock assessment levied against shares of stock of the New Jersey National Bank and Trust Company of Newark owned by him, in the principal sum of $2,250.00, together with interest on said assessments from September 12, 1932.

Emil Stein, the other plaintiff in this action, is obligated to me, as Receiver of said New Jersey National Bank and Trust Company of Newark, upon a written surety guaranty of a line of credit of William B. Stein & Company in the sum of $15,000.00. Said William B. Stein & Company is still indebted to me, as Receiver as aforesaid, in the sum of $11,989.72, besides accrued interest, upon a promissory note dated March 18, 1932, maturing June 20, 1932. Said Emil Stein is also indebted to me on a stock assessment for $7,000.00, levied against him by the Comptroller of the Currency upon stock owned by him and transferred within sixty days prior to the failure of said bank into the name of New Jersey Finance Company, together with accrued interest on said assessment from September 12, 1932.

The above named plaintiffs, Emil Stein and William B. Stein, instituted action against me in the Essex County Circuit Court January 22, 1940 for declaratory judgments. The subject matter of their said actions was the notes, stock assessments and guaranty above mentioned. The said declaratory judgment suits were removed to this Court, by order of the Essex County Circuit Court dated February 16, 1940, a transcript of the proceedings in the State court has been duly filed, and my answer has also been filed.

The liquidation of the New Jersey National Bank and Trust Company of Newark has been conducted under the

supervision of the Comptroller of the Currency by my predecessors and myself as Receiver, since June 11, 1932. During that period, dividends of one hundred per cent of the principal of claims of the depositors and creditors have been paid, as stated in the bill of complaint herein. At the time payment was made to the depositors and creditors of the five per cent dividend which made up the one hundred per cent payment to the depositors and creditors, each depositor and creditor receiving said dividend was required to receipt therefor on a form, a blank copy of which is attached hereto, made a part hereof by reference and marked Exhibit "A". At the same time, each depositor and creditor presented his Receiver's Certificate of Proof of Claim and the payment of the fifth dividend of five per cent, representing the final principal dividend, was endorsed on each certificate. At the same time, there was attached by the Receiver's office to each Certificate of Proof of Claim, a notice in the form annexed hereto, made a part hereof and marked Exhibit "B". This notice was securely fastened by wire brads to each certificate in the manner indicated by said exhibit. The legend on said notice states that a further dividend, representing all or part of the accrued interest on the claim, will be paid when liquidation of the remaining assets warrants such a distribution.

As Receiver of New Jersey National Bank and Trust Company of Newark, I am a bonded officer of the United States of America, acting under the supervision of the Comptroller of the Currency of the United States of America and appointed pursuant to the statutes in such case made and provided. I have been associated with the receivership of said New Jersey National Bank and Trust Company of Newark during the entire period of its liquidation, formerly as assistant to the Receivers and now as Receiver, and I am thoroughly familiar with the affairs of said receivership and the remaining assets. The liquidation of the bank has resulted in payment of dividends aggre-

gating one hundred per cent to the depositors and creditors, as above noted. The entire cost of the liquidation, including all operating expenses, Receivers' and employees compensation, legal fees and administrative disbursements of every nature, aggregate 3.4% of the total collections. If, to those expenses, is added the interest paid to the Reconstruction Finance Corporation on moneys borrowed for the purpose of paying the first and second dividends to depositors and creditors, the ratio of expense to total collections is 3.79%. These percentages were taken from the last quarterly report of this receivership to the Comptroller's office, dated December 31, 1939. As of the same date, the total interest collections of the receivership exceeded the total administrative expenditures by slightly in excess of $100,000.00, so that the receivership has been conducted without any expense charged to the principal of the assets up to the present time.

E. Lorry Keeton,
Receiver of New Jersey National
Bank & Trust Company of Newark.

Subscribed and sworn to before me
this 13th day of March, 1940.

Louise A. Robins,
Notary Public.

Exhibit "A."

CLAIM No.

AGAINST NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY

READ CAREFULLY

Upon return of this Receipt, properly signed and accompanied by the original RECEIVER'S CERTIFICATE OF PROOF OF CLAIM, to JOSEPH O'SHAUGHNESSY, RECEIVER, Belmont Avenue and Court Street, Newark, N. J., check for THE FIFTH (Final) Principal Dividend of 5 percent will be mailed or delivered to the Claimant.

If Claimant is deceased and a personal representative has been appointed, a CERTIFIED COPY OF SUCH APPOINTMENT indicating that the powers granted are still in force must accompany the Receipt.

Date

RECEIVED FROM THE COMPTROLLER OF THE CURRENCY, CHECK.

PAYABLE TO THE ORDER OF $

DOLLARS

IN PAYMENT OF FIFTH (Final)
PRINCIPAL DIVIDEND OF 5 PERCENT.

(Sign Here) .....
Write name exactly as shown above

Identified by .....

Address .....

Exhibit "B."

To The Depositors of the New Jersey National Bank and Trust Company of Newark, N. J.

"The check you are receiving herewith represents the fifth and final PRINCIPAL dividend of 5% which, according to the endorsement on your RECEIVER'S CERTIFICATE OF PROOF OF CLAIM, completes payment of the PRINCIPAL portion of your CLAIM. The assets have not been fully liquidated and a further DIVIDEND representing all or part of the accrued INTEREST on the CLAIM will be paid when liquidation of the remaining assets warrants such a distribution."

Do Not Destroy Your Certificate

"Carefully preserve the Receiver's Certificate of Proof of Claim attached, as it must be surrendered to the Receiver when the interest dividend is paid."

E. L. KEETON, Receiver
New Jersey National Bank and Trust Company

Stipulation in Open Court on March 18, 1940.

Mr. E. Lorry Keeton, Receiver of the New Jersey Bank and Trust Company, being present here in court, authorizes me to make the statement for him that, pending the determination of the meritorious questions involved in this litigation, specifically the question of whether or not the depositors and other creditors of the bank are entitled to interest upon their claims, no distribution of the funds in the hands of the Receiver, other than for ordinary administrative expenses, will be made.

The purpose of his undertaking is to preserve intact the funds available for distribution to stockholders or creditors until the question of who is entitled to said funds shall have been determined.

Memorandum.

UNITED STATES DISTRICT COURT,

District of New Jersey.

Emil Stein and William B. Stein,
Plaintiffs,

vs.

Preston Delano, Comptroller of the Currency, and E. Lorry Keeton, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey,
Defendants.

Memorandum.
Civil Action No. 829.
Reported in 35 Fed. Supp. 260.

Appearances:

Messrs. Kristeller & Zucker,

By: Saul J. Zucker, Esq.,
Attorneys for the plaintiffs and attorneys for Intervening plaintiffs, Walter H. Cole and Frank W. Miller.

Messrs. Bilder, Bilder & Kaufman,

By: Walter J. Bilder, Esq.,
Attorneys for Intervening plaintiffs, Edward M. Waldron, William J. Waldron, Robert E. Waldron, Samuel F. Dixon, Bernard Miller, Philip Lindeman, Arthur W. Barlow and Edward M. Waldron, Executor of the Estate of Mary Waldron, deceased.

MESSRS. BURNETT & TRELEASE,

By: CHARLES C. TRELEASE, ESQ.,
Attorneys for Intervening plaintiffs, Harvey G. Redden and John I. Spooner.

MESSRS. ARMSTRONG & MULLEN,

By: ARTHUR C. MULLEN, ESQ.,
Attorneys for Intervening plaintiffs, John F. Monahan and Frank J. McCann.

MESSRS. HARRISON & ROCHE,

By: ROBERT F. DARBY, ESQ.,
Attorneys for the Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, and Appearing Specially for Preston Delano, Comptroller of the Currency of the United States of America.

WALKER, District Judge.

This matter, by agreement of counsel, comes before the Court on final hearing.

The facts are:

1. The New Jersey National Bank and Trust Company of Newark, New Jersey was and is a national banking association, organized and existing under the laws of the United States of America.

2. On or about June 11, 1932, the then Comptroller of the Currency of the United States of America, pursuant to authority (Title 12 U. S. C. Sections 191, *et seq.*) appointed a receiver for said association, and thereafter the receiver and his successors undertook and proceeded with the necessary steps to close up such association.

3. An assessment of 100% upon all the outstanding capital stock has been levied and a substantial part thereof collected. Full provision has been made for the refunding to the United States of America any deficiency in redeeming the circulating notes of the association. The principal sum due on each creditor's claim (except those of shareholders, who are also creditors), proved or adjudicated as required under the terms and provisions of Title 12 U. S. C. Section 194, has been paid in full and the Comptroller has paid or has in his possession sufficient monies to pay the expenses of the receivership.

4. At the time each creditor presented his receiver's certificate of proof of claim for a fifth dividend of 5%, which 5% made a total payment of 100% on account of principal due, the receiver's office attached to each certificate of proof of claim a written notice that a further dividend representing all or part of the accrued interest on the claim would be paid when liquidation of the remaining assets warranted.

5. On March 2, 1940, the plaintiffs, as shareholders, on behalf of themselves and all other shareholders similarly situated[1] filed herein their complaint under Rule 23 (Federal Rules of Civil Procedure for District Courts), and thereby seek the following relief:

(a) a preliminary injunction and the appointment of a receiver, which need not be considered, because of a stipulation stated in open court.

(b) that the Comptroller be ordered to call a meeting of the shareholders for the purposes specified and set out in Title 12, U. S. C. Section 197.

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(1) (The Court notes and hereafter refers to the plaintiffs' allegations that they also file their complaint on behalf of the New Jersey National Bank and Trust Company of Newark, New Jersey.)

(c) that interest upon obligations held by former creditors be disallowed.

(certain other relief is sought; however, counsel have limited their argument to (c) and decision thereon determines whether the complaint stands or fails.)

6. The summons issued pursuant to Rule 4 (Federal Rules of Civil Procedure for District Courts) was served upon the Comptroller of the Currency at Washington in the District of Columbia on the 6th day of March, 1940, and said Comptroller appears specially and moves to quash same on the grounds that he is a resident, citizen and inhabitant of the District of Columbia and is not and was not subject to service of process in this, an action instituted in the District of New Jersey, and said service is without authority of law.

7. The receiver moves to dismiss the action against him and alleges the complaint fails to state a claim upon which relief can be granted.

The first question is:

Should the service of a summons in this, an action in the District of New Jersey, be quashed when it appears that it was made at Washington in the District of Columbia upon the Comptroller of Currency of the United States of America, a resident, citizen and inhabitant of said District of Columbia?

The long established and general rule regarding jurisdiction in personam, should be varied only in case of expressed statutory authorization.

The expressed statutory authorization upon which the plaintiffs rely is:

> "All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national

banking association, shall be had in the district where such association is located." (Section 49 of the Judicial Code.) Title 28 U. S. C. Section 110.

The proceedings herein are by persons who happen to be shareholders in a national banking association. The end they seek is a ratable distribution of the proceeds of the assets or property of the association remaining in the hands or subject to the order and control of the Comptroller and the receiver appointed by him (12 U. S. C. Section 197), without deduction of interest on the approved or adjudicated claims of creditors. The fruits of the litigation, if successful, will inure directly to their benefit, and while it can be admitted for the purposes hereof that they and those they represent collectively own all the stock of the institution, it does not follow that in an action such as this, they prosecute as the owners of said institution or for its benefit. This cannot be called a proceeding by a national banking association, and therefore it is not expressly authorized by Section 110, *supra.* (See *Wilson* vs. *Awalt, Acting Comptroller of the Currency et al.,* 2 Fed. Supp 463; *Nagle, et al.* vs. *O'Connor, Comptroller of the Currency, et al.,* 88 Fed. 2nd, 936, Cir. 3rd; *(Adams* vs. *Nagle, et al.),* 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999. In *Nagle, et al.* vs. *O'Connor, supra,* the District Court quashed the service upon the Comptroller, and the correctness thereof was raised in the Circuit Court which did not deem it necessary to directly pass thereon.)

The Court believes special reference to the following cases is advisable:

First National Bank of Canton, Pennsylvania vs. *John Skelton Williams, Comptroller of the Currency,* 252 U. S. 504, 40 S. Ct. 372, 64 L. Ed. 690, an action by a going national bank to restrain the Comptroller of the Currency from doing certain things under color of his office. *Wegman, et al.* v. *Hulse, et al.,* 13 Fed. 2nd, 206, an action by

stockholders as a class to restrain the Comptroller of the Currency from compromising a suit brought by the receiver appointed by him against directors of the banking association. Both cases were prosecuted for the benefit of a national banking association and for such indirect benefit to the shareholders as might arise therefrom. The real party in interest in each was a national banking association. These cases are not in conflict with the decision herein.

O'Connor, Comptroller of the Currency, et al. vs. *Watson, et al.*, 81 Fed. 2nd, 833, Cir. 5th, and *Abel, et al.* vs. *Hellawell, et al.*, 25 Fed. Supp. 446, extend the rule laid down in *First National Bank of Canton, Pennsylvania* vs. *John Skelton Williams, Comptroller of the Currency,* and *Wegman, et al.* vs. *Hulse, et al., supra,* to permit the maintenance under Section 110, *supra,* of derivative actions by shareholders seeking to relieve themselves from statutory double assessment liability. Actions by shareholders to relieve themselves from statutory double assessment liability are for the benefit of the shareholders individually, and not by or for a national banking association within Section 110, *supra.* Said cases cannot be reconciled.

The alleged service of the summons herein upon Preston Delano, Comptroller of the Currency of the United States of America, a resident, citizen and inhabitant of the District of Columbia is quashed.

The second question is:

Do creditors of a national banking association in liquidation, who accept dividends totaling the full amount of the principal sum due, thereby waive interest?

The provisions of the National Banking Act (12 U. S. C. Sections 21, *et seq.*) constitute a complete system for the establishment, government and liquidation of national banks. (*Cook Co. Nat. Bank and another* v. *United States,* 107 U. S. 445, 2 S. Ct. Rep. 561, 27 L. Ed. 537; *David* v. *El-*

mira Sav. Bank, 161 U. S. 275, 16 St. Ct. Rep. 502, 40 L. Ed. 700; *Downey* v. *City of Yonkers and three other cases,* Cir. 2nd, 106 Fed. (2d) 69; *Deitrick, Receiver* v. *Greaney,* 309 U. S. 190, 60 S. Ct. 480, rehearing denied, 309 U. S. 697, 60 S. Ct. Rep. 611.)

The Act, however, does not specifically provide for interest on claims of creditors, and the plaintiffs urge this in support of their contention that interest is not payable; and they also urge that the ratable dividend which the Comptroller is to make from time to time on claims proved to his satisfaction or adjudicated in a court of competent jurisdiction (12 U. S. C. 194) is to be estimated on the value of the claim at the time of the declaration of insolvency. (*U. S.* v. *Knox,* 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; *Merrill* vs. *National Bank of Jacksonville,* 173 U. S. 131, 19 S. Ct. Rep. 360, 43 L. Ed. 640; *Kennedy* v. *Boston-Continental Nat. Bank,* Cir. 1st, 84 Fed. (2d) 592.)

U. S. v. *Knox; Merrill* v. *National Bank of Jacksonville,* and *Kennedy* v. *Boston-Continental Nat. Bank, supra,* were actions by one or more but not all of the creditors, who sought a dividend on a sum established by judgment or otherwise subsequent to insolvency, and hold there must be one rule of proportion applicable to all alike, and therefor that which is hereinafter set forth is not in conflict therewith.

The value of each claim at the time of the declaration of insolvency is the principal sum due, and it is unnecessary to reduce it to a judgment when proved to the satisfaction of the Comptroller. It then has the same efficacy as a judgment, as a claim adjudicated in a court of competent jurisdiction, and occupies the same legal ground. (*The National Bank of the Commonwealth of New York City* vs. *The Mechanics' National Bank of Trenton,* N. J., 94 U. S. 437, 24 L. Ed. 176.)

The claims herein proved to the satisfaction of the Comptroller had the same efficacy and occupied the same legal ground as judgments in the United States District Court for the District of New Jersey, and bore interest the same as judgments in the courts of the State of New Jersey (28 U. S. C. 811).

In New Jersey without benefit of statute, the practice has been for many years to allow interest to be levied under execution as an incident of the judgment, and as an increase of damages for the detention of the debt without bringing a distinct action for the interest on damages for such detention (*Cox, et al.* v. *Marlatt*, 36 N. J. L. 389).

It must also be remembered: the stockholders of the National Bank in question are individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein at the par value thereof, in addition to the amount invested in such stock (12 U. S. C. 63, 64), and there is no reason to deny to the creditor, as against the stockholder, the same right to recover interest, which according to the nature of the contract or debt would exist as against the bank itself, even to the extent of the double assessment liability of the stockholders. (*Richmond* vs. *Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 564; *U. S. Savings Bank* vs. *Morgenthau*, Cir. 1st, 85 Fed. (2d) 811.)

Whether we hold the claims bear interest the same as judgments in the Courts of New Jersey or under the principle that creditors have the right to recover interest against the stockholder as against the bank itself, is immaterial.

It is sufficient to say that, when the creditors received the first dividend of 50%, the second dividend of 25%, the third dividend of 10%, the fourth dividend of 10% and right down to the acceptance of the fifth dividend of 5%, they had a right to interest from the date the business of the bank stopped, that is, when insolvency was declared.

The interest due them was compensation or damages for the detention of principal (*Rogers* v. *Colt*, 21 N. J. L. 18; *North River Meadow Co.* v. *Christ Church at Shrewsbury*, 22 N. J. L. 424; *Hills* v. *Aetna Life Insurance Co.*, 39 N. J. L. J. 132; *Fidelity Mut. Life Insurance Co.* vs. *Wilkes-Barre & H. R. Co.*, 98 N. J. L. 507, 120 Atl. Rep. 734; *Warren Bros. Co.* v. *Hartford Accident & Indemnity Co.*, 102 N. J. L. 616, 133 Atl. Rep. 479) not under and by virtue of an express agreement, and the general rule is, the right to recover same after the full principal obligation has been accepted is lost. (*Stewart* vs. *Barnes*, 153 U. S. 456, 14 S. Ct. 849, 38 L. Ed. 781; *Rice* vs. *Eisner*, Cir. 2nd, 16 Fed. (2d) 358; *Board of Freeholders* v. *Veghte*, 7 N. J. L. J. 145.)

The general rule aforesaid, should control herein, in the absence of an exception thereto.

The Comptroller, when he takes over a bank, is required to take possession of all bank records and assets of every description; collect all debts, dues, and claims belonging to it; on order sell or compound all bad or doubtful debts; sell all real and personal property; and, if necessary, enforce the individual liability of all stockholders. For some time it is difficult, if not impossible, for him to tell whether or not he will be in a position to pay in full the principal amount of each claim, in which event the creditors will be entitled to interest from the assets of the bank including the double liability of stockholders. Yet from time to time he is required to pay the ratable dividend hereinbefore referred to. To facilitate administration (*Sexton* v. *Dreyfus*, 219 U. S. 339; *Chemical National Bank* vs. *Armstrong*, 59 Fed. 372), it seems the perfectly rational and orderly thing to make each dividend a payment on account of principal and then when it appears that the interest or some percentage thereof can be paid, to so advise in the manner used by the receiver herein.

The written notice that a further dividend representing all or part of the accrued interest on the claim would be paid when liquidation of the remaining assets warranted, did not give the creditors any right they did not have. They had a right at the time of the fifth dividend to interest as an incident for the detention of the debt. A demand therefor, was unnecessary, the act of liquidation having dispensed therewith, (*Richmond* vs. *Irons, supra*), and to hold they should refuse the final payment on account of principal until it was ascertained whether they would receive interest and how much, and until same was paid, would frustrate the very thing the act intends and the courts want, that is, a complete, thorough and efficient administration without delay and unnecessary expense.

Creditors of a national banking association in liquidation, who are advised by the receiver prior to payment of the final dividend on account of principal, that the assets have not been fully liquidated and a further dividend representing all or part of the accrued interest on the claim will be paid when liquidation of the remaining assets warrant such a distribution, are removed from the general rule that when interest is an incident for the detention of the debt, the right to recover same after the full principal obligation has been accepted is lost.

The creditors of the New Jersey National Bank and Trust Company of Newark, New Jersey, are by reason of the facts herein, exceptions to the general rule and entitled to interest.

The motion of the receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey to dismiss the complaint filed in this cause is granted.

Conclusions of Law.

An action in the District Court of New Jersey by stockholders who seek a ratable distribution of the proceeds of the assets or property of a national banking association in liquidation remaining in the hands or subject to the order and control of the Comptroller and the receiver appointed by him, without deduction of interest on the approval or adjudicated claims of creditors, is not an action by a national banking association, and therefore outside Title 28 U. S. C. Section 110, and service of summons in such an action upon the Comptroller of the Currency of the United States of America, a resident, citizen and inhabitant of the District of Columbia at Washington in said District of Columbia, should be quashed.

Creditors of a national banking association in liquidation, who are advised by the receiver prior to payment of the final dividend on account of principal that the assets have not been fully liquidated and a further dividend representing all or part of the accrued interest on the claim will be paid when liquidation of the remaining assets warrant such a distribution, are removed from the general rule that when interest is an incident for the detention of the debt, the right to recover same after the full principal obligation has been accepted, is lost.

Order Quashing Service and Dismissing Bill of Complaint.

This matter coming on to be heard upon

(a) the return of an order to show cause, dated March 4, 1940, why the relief prayed for therein should not be granted;

(b) the return of a notice of a motion by the defendant, Preston Delano, Comptroller of the Currency, appearing specially for the purpose of quashing the service of process herein against him, it appearing that the summons and complaint in this action were served upon the said defendant outside the jurisdiction of this District, to wit: in Washington, in the District of Columbia; and

(c) the return of a notice of a motion by the defendant, E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, to dismiss the complaint filed herein on the ground that the same did not set forth a good cause of action;

and the Court having examined the verified bill of complaint and the answering affidavit filed by the defendant, E. Lorry Keeton, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, and having heard oral argument in the presence of Kristeller and Zucker, Esqs., by Saul J. Zucker, Esq., attorneys for plaintiffs, and Harrison & Roche, Esqs., by Robert F. Darby, Esq., attorneys for the defendant, Preston Delano, Comptroller of the Currency, appearing specially, and for the defendant, E. Lorry Keeton, Receiver, etc., and having considered the briefs submitted by the attorneys for the respective parties, and by Bilder, Bilder & Kaufman, attorneys for some of the intervenors; and it being further

stipulated in open court by counsel for all of the parties herein, that the issues raised by the verified bill of complaint and the answering affidavit be considered as upon final hearing, and that the decision of this Court upon the legality, validity and efficacy of the complaint herein be deemed to constitute the final judgment adjudicating the rights of the parties herein; and the Court having duly filed its opinion herein containing the findings of fact and conclusions of law,

It is, on this 25th day of November, ORDERED, ADJUDGED and DECREED:

1. That the service of process upon the defendant, Preston Delano, Comptroller aforesaid, in Washington, in the District of Columbia, be and the same is hereby quashed.

2. That the complaint herein be and the same is hereby dismissed as not setting forth a good cause of action.

3. That any and all applications for costs and counsel fees be and the same are hereby reserved.

THOMAS GLYNN WALKER,
U. S. D. J.

Appendix to Appellees' Brief.

Treasury Department
Office Comptr Currency

G. W. M.

May 18th 1878

Sir:

I have received your letter of the 13th inst. with draft on Importers & Traders Natl Bank New York for Seven Thousand Dollars. Also your letter of the 15th inst. with drafts as stated amounting to $2,731.04. I have also received per Express One Thousand Dollars in currency advised in your letter of the 14th instant.

I have deposited these several amounts with the Treasurer U.S. for benefit of the creditors of the Commercial Natl Bank of Kansas City, Mo.

Your statement of account agrees with the books of this office with the following exceptions. At the time of the failure of the bank there was on deposit in the 5% fund only $1,250 $500 of their circulating notes having been redeemed by the Treasurer and sent to this Office and destroyed leaving outstanding circulation to be provided for $44,500 instead of $45,000 the original amount.

Of this $1250 the Treasurer transferred $492 to my credit for benefit of the creditors of the bank and has retained $758 for semi-annual duty on deposits circulation and capital stock, but has not yet been settled or allowed by me.

I have also paid $7.11 for Telegraph bills. There will now be sufficient to pay the 25% remaining due upon claims as suggested by you.

A recent decision of the Supreme Court allows creditors of insolvent banks interest upon their claims. Presuming that before this dividend could be paid you would collect enough to cover this interest I have thought best to make the final dividend to include the interest as well as the 25% due upon the original claim. I have therefore telegraphed

you—"compute interest on claims from date of proof and make checks for balance due". You will understand that the interest is to be computed at the legal rate, and is to be allowed upon the whole amount of the claim from date of proof up to the declaration of the 75% dividend, and upon the balance of 25% from the date of that dividend to the final payment.

You also enclose in your letter of the 15th the following dividend checks viz

No 33918	for	453.78	
33993	"	21	
33916	"	57	$531.78

the claims having been allowed as offsets. I have canceled these checks and return them herewith to be affixed in check book with explanation.

Very respectfully

Jno Jay Knox
Comptroller

H. B. Cullum Esq Recr
Commercial Natl Bk
Kansas City, Mo.

M. C.
McC.

Treasury Department
Office of Compt of Currency

G. W. M.

Sept 10, 1878

Sir:

I have received your letter of the 9th inst. in reference to the amount to be allowed for your salary since January 1st.

The amount named by you, $100 per month will be satisfactory.

In reference to the interest dividend I think you had better compute it upon all the claims whether demanded now or not, as if a part only are allowed it some trouble may arise hereafter and they are all entitled to it if any are.

Very respectfully,

Jno J. Knox,
Comptroller

B. W. Woodward, Esq. Recr.
Watkins Natl Bank
Watkins N. Y.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

VS.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

And afterwards, to wit, the 3d day of March, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable William Clark and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of June, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

No. 7644. October Term, 1940.

EDWARD M. WALDRON, ET AL.,
Plaintiffs-Appellants,

vs.

SAME,
Defendants-Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

Opinion.

(Filed June 30, 1941.)

Before MARIS, CLARK and GOODRICH, *Circuit Judges.*

CLARK, *Circuit Judge.*

The national bank whose difficulties occasioned this litigation was one of the first to bow before the storm.

The Comptroller appointed a receiver on June 11, 1932. This stitch seemed very much in time for the subsequent administration of the bank's assets resulted in the full repayment of the principal of the funds deposited. At the beginning of this administration the Comptroller exercised his statutory [1] power to assess the bank's stockholders. This assessment netted $1,000,000 approximately and there now remains on hand $750,000 after payment of the dividends before mentioned. The Comptroller now wishes to use part of these monies to pay interest to the depositors for the amounts which have been withheld from them during all the years the bank was closed and in liquidation. Certain stockholders, by way of a class action, object to such payment and demand the return of what is left of their assessment. The learned district judge held against them in a reported opinion [2] and they now appeal his decision.

The stockholders' arguments are, we think, more of policy than of law. The hostility to interest is both ancient [3] and deep-rooted. [4] It stems from the stereotyping effect of philosophy and religion on a concept changed after the adoption of the dogma. In a primitive agricultural society the weak and necessitous are at the mercy of the shrewd and unscrupulous. The commercial borrower, on the other hand, needs money to make money and should be treated accordingly. [5] In general realization of this, the Roman law permitted recompense for failure to repay. From this we derive the name itself (id quod interest, that which is between). By the Sixteenth Century the gap between religious theory and commercial practice had been further narrowed. The new Protestant ethical system regarded only excessive exactions as usury. Even then the English

[1] 12 U. S. C. A. § 63.
[2] Stein v. Delano, 35 F. Supp. 260.
[3] Plato, Treatise de Legibus, v. 742; Aristotle, Politics, 1, 4, 23; Moses, Exodus, XXII, 25.
[4] Holdsworth, 8 History of English Law (2d ed.) 100-112; Bellott's Bargains With Money Lenders, Chapter 1.
[5] Bacon's Essay on Usury.

law wavered about what was excessive, swinging from statutory maximums [6] to control by the courts of conscience [7] and back to statutory maximums in the case of the poor debtor who took the place of the poor peasant of earlier days. [8] Our own law was formed at the period of rigid maximums. In this country, however, mercantile influence seemed less in awe of traditional theology and the courts were less intransigent toward the extension of the limits of the recovery of interest as damages. [9]

In the case at bar the aversion to paying for the money you hire is combined with another distaste. Stockholders in banks have shown a reluctance to accept the condition upon which they have been allowed to take charge of other people's money. That condition is a partial withdrawal of the shield afforded by the corporate device. The device limits the owner's risk and the creditor's security simultaneously. [10] It seems reasonable to increase both in a business where the owners take most of the profit and the customers take most of the risk. As long ago as 1808 Pennsylvania had had the idea [11] and in 1846 the New York Constitution "reflected the prevailing grievance of the time" and imposed superadded liability about as we know

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[6] 37 Henry VIII, c. 9; 5, 6, Edward VI, c. 20.

[7] See Chesterfield v. Janssen, 1 Ark. 339, 26 Eng. Rep. 191 (1750); Earl of Aylesford v. Morris (1883); L. R. 8, Ch. 484.

[8] Money-lender's Acts, 63 and 64 Victoria, c. 51; 1 and 2 George V, c. 38; 17 and 18 George V, c. 21; compare the controversy in our own country over small loan finance companies, Stone and Thomas, California's Legislature Faces the Small Loan Problem, 27 California Law Review 286; Loan Sharks and Loan Shark Legislation, 8 Journal of Criminal Law 69; Bar Defeats Loan Sharks, 10 Missouri Bar Journal 44; Bar Sponsors Anti-Loan Shark Bill, 10 Missouri Bar Journal 3.

[9] 1 Sedgwick, Damages (9th ed.) §297; 30 Amer. Jur. Interest §§ 3 and 4, and cases cited; cf. Knight, Interest, 8 Ency. of Social Sciences p. 131; Clark, Capital and Its Earnings, American Economic Association, Monographs, vol. 3, no. 2; Clark, Distribution of Wealth; Fetter, Economic Principles, Pt. 5; Fetter, Interest Theories Old and New, 4 American Economic Review 68; Fisher, The Rate of Interest; Fisher, The Theory of Interest; Cassel, The Nature and Necessity of Interest; Landry, L'interet Du Capital.

[10] The origin of limited liability for stockholders appears to be in dispute. Compare Williston, Law of Business Corporations, 2 Harvard Law Review 105, 149, 160-162 with Warren, Safeguarding The Creditors of Corporations, 36 Harvard Law Review 509, 516-522.

[11] Myers v. Irwin, 2 Serg. & R. (Pa.) 368.

it today.[12] Now nearly a hundred years later the pendulum has swung back and many of the statutes and constitutions imposing liability have been repealed or amended.[13] The exact reason for this change of legislative heart is not difficult of explanation. The panic of 1929 and the bank failures of 1932-1933 have made bank stockholders into a suffering and so vocal class. Many of them interposed every possible defense against collection.[14] Finally, a combination of these two factors suggested that the stockholders keep the profit, the depositors have their security, and the government take the risk.[15]

We have discussed these two hostilities at some length because they seemed to us the only way of accounting for the earnestness with which the principal case has been pressed. For the law is well-settled and is with the Comptroller.[16] Three reasons are generally given for this rule. The delay in payment is not the act of the debtor but is an act of the law for the mutual benefit of all the creditors.[17]

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[12] 3 Zollman, Banks and Banking (Perm. Ed.) § 1611, Early History of Superadded Liability.

[13] 12 U. S. C. A. § 64a; Ga. Laws 1937, No. 492, p. 429, § 1; Ind. Stat. Ann. (Burns, Supp. 1939) § 18-1902; Iowa Laws 1936-1937, c. 219, § 1; Kan. Gen. Stat. Ann. (Corrick, Supp. 1937) § 9-110; Ky. Stat. Ann. (Baldwin, 1936) § 595; Me. Laws 1935, c. 287, p. 47; Md. Laws 1937, c. 81, § 1; Mass. Ann. Laws (Supp. 1938) c. 172, § 24; Mich. Comp. Laws (Mason, Supp. 1935) § 11899-1; Nev. Comp. Laws (Hillyer, Supp. 1938) § 661; N. Y. Laws 1936 c. 831, § 120-a; N. C. Code Ann. (1935) § 219a; N. D. Laws 1937, c. 95; Pa. Stat. Ann. (Purdon, 1939) tit. 7, c. 29, § 819-614; Tex. Const. Art. XVI, § 16; Vt. Pub. Laws (1933) § 6810; Ariz. Const. Art. XIV, § 11; Ill. Const. Art. XI, § 6; Minn. Const. Art. IX, § 13; Nebr. Const. Art. XII, § 7; Ohio Const. Art. XIII, § 3; Ore. Const. Art. XI, § 3; S. C. Const. Art. IX, §18; Utah Const. Art. XII, § 18; Wash. Const. Art. XII, § 11; W. Va. Const. Art. XI, § 6.

[14] Banks and Banking—Stockholders' Superadded Liability—Liability for Interest and Cost of Receivership, 39 Columbia Law Review 1414.

[15] 12 U. S. C. A. § 264. Federal Deposit Insurance Corporation. Of course, the risk is no more than that borne by any insurer and is ultimately distributed among those insured.

[16] The cases are collected in 3 Zollman, Banks and Banking (Perm. Ed.) § 1781, Interest on Debt to Which Superadded Liability Attaches; 3 Michie, Banks and Banking (Perm. ed.) § 219 Interest: Right to and Liability For; Banks and Banking—Stockholders' Superadded Liability—Liability for Interest and Cost of Receivership, 39 Columbia Law Review 1414 (note); Banks and Banking—Insolvency and Dissolution—Allowance of Interest on Claims, 3 Detroit Law Review 188.

[17] People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200; Boston & A. R. R. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 A. 778, 38 L. R. A. 97; Attorney General v. Supreme Council A. L. H., 206 Mass. 131, 92 N. E. 134.

In the case of claims bearing different rates of interest, it would be inequitable to permit the running of interest to increase the proportion of the assets to which some of the creditors are entitled at the expense of other creditors while the estate is in the process of administration.[18] If all claims bear the same rate of interest, the addition of interest would not change the proportion of the assets to which each would be entitled. The computation may therefore be omitted as a useless act.[19] It is apparent that the last two reasons are not valid in the face of a surplus. The logic of a writer in the Michigan Law Review seems unanswerable:

> "On the other hand, when the surplus is sufficient to pay in full the interest due to all the creditors, a difference in the rates provided by their contracts is not productive of any unjust inequality between them. The rights of one are in no way affected by the amount received by another. An amount equal to the principal is paid to each. Even where the surplus will not pay all the interest in full, no unjust inequality results from dividing it on the basis of different contract rates. The balance remaining due is proportioned to the compensation that each should receive for the use of his money. There is no injustice in computing the proportion of compensation to be received by each creditor on the basis of the rate of compensation for which he contracted. This is an entirely different matter than decreasing the porportion of *principal* to be received by one creditor by adding interest at a higher rate in computing the dividend of another creditor. And where there is a surplus, the computation and addition of interest to all claims at the same rate would no longer be a useless act."
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> Hanson, Effect of Insolvency Proceedings on Creditor's Right to Interest, 32 Michigan Law Review 1069, 1082-1083.

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[18] American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261; People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004.
[19] Re John Osborn's Sons Co., 177 Fed. 184, 29 L. R. A. (N. S.) 887.

The third remains but is particularly unsound in the superadded liability cases. In an ordinary involuntary insolvency the prevention of paying may in a sense be attributed to the law and not to the debtor. If there is a surplus, therefore, it may be argued that the proceedings were wrongfully instituted and so the debtor should be excused from paying interest during the delay. Even here a large majority of the creditors may have nothing to do with the commencement of the proceedings and the debtor may be at fault in conducting his business in such a way as to subject himself to reasonable suspicion of insolvency. In the bank cases the surplus arises only from the very cause that the stockholders now assign as an excuse for getting it back. Zollman, a leading authority on the subject, puts it thus:

> "Where a bank is so badly insolvent that the entire superadded liability of the stockholders when collected is insufficient to pay the principal of its debt, no question can arise whether its creditors are to receive interest. Any computation of such interest would be a useless effort. However, some of the bank failures are not of this description. It happens that a *portion* of the superadded liability is sufficient to pay the principal of all the debts. The question then arises whether the creditors are entitled to interest as against the stockholders. It is clear that the contracts, debts, and engagements of the bank have not been fulfilled so long as interest is unpaid. It may be a hardship on the stockholders to hold them for interest accruing during the delay of administration. It certainly is a hardship on the creditors to lose this interest. The question, however, is not one of hardship, but of legal right. Within the statutory limits the stockholder is bound for the whole debt and not for a part of it . . .
>
> "A depositor whose claims are due on demand is

entitled to interest on his deposits from the time when the bank becomes insolvent, closes its doors, and suspends payment . . .''

3 Zollman, Banks and Banking (Perm. ed.) § 1781.[20]

The only escape from the authorities lies in accession to the arguments with which we began this opinion. They are, as we pointed out, considerations of policy. We do not happen to agree with the policy and are therefore happy in following what we consider binding authority, alterable as always by legislative action. The appellants' attempt at avoidance by way of distinction does not impress us. They argue first that the stockholders' responsibility is limited by the statutory language, ''contracts, debts and engagements'',[21] and second that the acceptance of the principal waives the right to interest. To so interpret the statute would be to interpolate the words ''principal amount of'' before ''debt''. That would, of course, be contrary to a general usage whereby the latter term connotes no such qualification. The authorities are unanimous in their rejection of any such view. Fletcher Cyclopedia Corporations collects them and says:

> ''When a liability for interest is a debt against the corporation, it is like any other debt, and the stockholders are liable therefor, as well as for the principal, provided, of course, they are not thereby held to any greater liability in amount than is fixed by the statute. The statutory liability of stockholders extends to interest on the debts of the corporation during the administration of its affairs in case of bankruptcy, insolvency, or receivership, where, because of the nature of the debt, the right to recover interest would have existed against the corporation . . .''
>
> 13 Fletcher Cyclopedia Corporations § 6299.

[20] Creditors' Rights—Banks and Banking—Secured Creditors' Rights to Lien for Interest and Principal of Debt Owed By An Insolvent Bank, 24 Virginia Law Review 803 (note); Glenn, Liquidation § 488.

[21] 12 U. S. C. A. § 63.

The rule as to waiver of interest is equally inapplicable. It does not apply in receiverships for the reason that during the administration nothing could have been accomplished by a formal demand for interest. Until the principal of all the claims are paid it can not be known whether the estate would have enough remaining assets to make payment upon the interest. Therefore there can be no waiver of the claim for interest.[22] The writer of the law review article from which we have already quoted summarizes the matter thus:

> "Even if it be conceded that the dividends are principal, it should not follow that the obligation for interest is thereby extinguished. The rationale of the general rule in this regard is that when the creditor *voluntarily* accepts the principal as such, he ought to be regarded as having waived the interest. In the insolvency cases there is no voluntary acceptance of principal because the creditor is precluded from rejecting the dividends and demanding payment of principal and interest in full."
>
> Hanson, Effect of Insolvency Proceedings on Creditor's Right to Interest, 32 Michigan Law Review 1069, 1085.

Although not mentioned below, the appellants now argue against the imposition of the legal rate of interest. They claim that the statute[23] authorizes the payment of the prevailing interest rate with a maximum of six per cent. This contention is in accord with economic law.[24] As we have

[22] State ex rel. McConnel v. Park Bank and Trust, 151 Tenn. 195, 268 S. W. 638; Greva v. Rainey, 2 Cal. (2) 338, 41 Pac. (2d) 328; Flynn v. American Banking and Trust Co., 104 Me. 141, 69 A. 771; Parker v. Adams, 38 Misc. 325, 77 N. Y. S. 861; see also 39 A. L. R. 457; 44 A. L. R. 1162; Glenn, Liquidation § 488.

[23] N. J. R. S. 31:1. Even before Erie v. Tompkins, Federal courts awarded interest on damages at rates set by state law. See interest Rates in Federal Courts, 44 Harvard Law Review 105.

[24] Knight, Interest, 8 Ency. of Social Sciences 131.

pointed out earlier, however, our law is derived from the period of compromise between no interest and usury. In New Jersey there can be no doubt. [25] The appellants cite in support of their argument three cases. [26] The two latter are not in point. In each the defendant wrongfully withheld money from the plaintiff in lieu of borrowing that sum. The defendant was therefore assessed for the amount he profited by the use of the wrongfully withheld money—its interest at the rate he would have had to pay for the loan. But the New Jersey National Bank and Trust Company did not profit to any ascertainable amount by becoming insolvent and failing to pay its depositors. It is being assessed interest for the damage it did its creditors, rather than for any profit it obtained from the failure to honor its debts. The remaining authority, Jersey City *v.* O'Callaghan, is said to contain language which states that the statutory rate is merely the presumed legal rate.

> "The law takes the legal rate of interest as the fair measure of such damages, on the theory that if the money had come to hand it would have produced that rate. The law endeavors to indemnify the party injured, and as the injury consists in the loss of the use of money, such indemnification will be afforded by giving the value of such use, *which it is presumed is the interest at the rate fixed by law,* and to accomplish this it is obvious that when the rate of interest is changed, the standard of damages is necessarily changed, for to take either the greater or lesser sum of the varying interest would be to use a gauge out of proportion to the loss and would manifestly fail to produce a just compensation. . . . *To compensate the party injured, and to do nothing more than*

[25] Jersey City v. Flynn, 74 N. J. E. 104, 70 A. 497.
[26] Jersey City v. O'Callaghan, 41 N. J. L. 349; Agnew Co. v. Patterson Bd. of Education, 83 N. J. E. 49, 89 A. 1046; Homer v. Heinecke, 86 N. J. E. 176, 98 A. 393.

> *to compensate him, the measure of damages should be the rate of interest as it is varied by legislation during the period of damage."*
>
> Jersey City *v.* O'Callaghan, 41 N. J. L. 349, 354 (italics ours).

We believe that the appellants have twisted the meaning of this opinion by attaching overdue importance to the words first italicized and not enough to the second italicized sentence. If the statute is presumed to be the legal interest rate, that presumption is conclusive. Our construction of the decision is the one adopted by the New Jersey courts.

> "The rate chargeable for the forbearance of money is, in the absence of agreement to the contrary, the legal rate. Jersey City *v.* O'Callaghan, 41 N. J. L. 349, is in point. It was there held by the court of Errors and Appeals that where damages for breach of contract are to be assessed or where an equivalent is to be given for the use of money forborne, the statutory rate is the rate to be computed. If, then, interest be given at all, it would be given at the rate of 6%."
>
> Jersey City *v.* Flynn, 74 N. J. E. 104, 124, 70 A. 497, 505, modified as to another point, 76 N. J. E. 607, 76 A. 3.

The learned trial court quashed the summons against the Comptroller. As we view it, the question there involved, although interesting, need not have been considered. The Comptroller's agent, the receiver of the bank, has appeared in the action and will be bound by our decision.[27] That being so, any adjudication with respect to jurisdiction over the Comptroller would be in the form of an advisory opin-

[27] Appendix to appellees' brief, p. 9.

ion. [28] That the courts of this country are not authorized to give.

The judgment of the District Court is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[28] Hudson, Advisory Opinions of National and International Courts, 37 Harvard Law Review 970; Frankfurter, A Note on Advisory Opinions, 37 Harvard Law Review 1002; The Advisory Opinion and the United States Supreme Court, 5 Fordham Law Review 94, 114 (note); cf. Borchard, The Constitutionality of Declaratory Judgments, 31 Columbia Law Review 561.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 7629. October Term, 1940.

EMIL STEIN, ET AL.,
Plaintiffs-Appellants,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY, AND E. LORRY KEETON, RECEIVER OF NEW JERSEY NATIONAL BANK AND TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants-Appellees.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

WILLIAM CLARK,
Circuit Judge.

Philadelphia,
June 30, 1941.

Endorsements—

Order Affirming Judgment
Received & Filed June 30, 1941
Wm. P. Rowland, Clerk

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } *Sct.*
THIRD JUDICIAL CIRCUIT

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendices to the briefs of appellants and appellees, as constituting the portions of record before this Court at argument; and proceedings in this Court in the case of Emil Stein, et al., appellants *vs.* Preston Delano, Comptroller of the Currency, et al., appellees, No. 7629, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said
(Seal) Court, at Philadelphia, this 17th day of July in the year of our Lord one thousand nine hundred and forty-one and of the, Independence of the United States the one hundred and sixty-sixth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 358

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.
744 Broad Street,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

OCTOBER TERM 1940.

No. .

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Emil Stein, a stockholder of New Jersey National Bank & Trust Company of Newark, New Jersey, on behalf of himself, the New Jersey National Bank & Trust Company of Newark, N. J., and all other stockholders thereof similarly situated, respectfully shows:

I.

Summary Statement of the Matter Involved.

The within application for a writ of *certiorari* is prosecuted to review a judgment of the Circuit Court of Appeals for the Third Circuit, entered June 30, 1941 (R. 94), affirming a judgment of the United States District Court for the District of New Jersey, entered November 25, 1940, (a) quashing service of process upon respondent, Preston Delano, Comptroller of the Currency, and (b) dismissing the complaint as against the respondent receiver, as not setting forth a good cause of action (R. 77).

In affirming the District Court, the Circuit Court of Appeals specifically eliminated the determination of the jurisdictional question, i. e., the effect of the service of process upon the Comptroller outside of District of New Jersey, to wit: in the District of Columbia (R. 92)—contenting itself with an affirmance of the judgment dismissing the complaint on the merits (R. 93).

The facts leading up to the institution of the litigation below, briefly stated, are:

On June 11, 1932, the then Comptroller of the Currency, pursuant to authority vested in him under the "National Banking Act," appointed a receiver of the New Jersey National Bank & Trust Company of Newark, New Jersey (Title 12 U. S. C. Secs. 191, 192). In connection with the liquidation of the bank's affairs, a 100% assessment was levied upon the outstanding capital stock of $2,800,000.00, and approximately $1,000,000.00 was collected from the stockholders (R. 84).

From time to time the original and succeeding receivers of the bank paid dividends upon the principal of the claims which creditors (depositors) had filed (Title 12 U. S. C. Sec. 194). Each dividend clearly and unequivocally stated that it was a payment "*on account of principal.*" When the fifth dividend was paid it was accompanied by a printed statement that it was the "*fifth and final principal dividend of 5% which * * * completes payment of the principal portion of your claim.*" (R. 65.) The statement also said that an interest dividend would be paid when further liquidation of the remaining assets warranted it.

After payment of the full principal of all claims, there remained approximately $750,000.00 which constitutes the fund in dispute in this litigation. The Comptroller threatened to distribute the fund to the creditors as interest for the delay in payment of the principal of their claims. The stockholders, on the other hand, claimed that the fund belonged to them (Title 12 U. S. C. Secs. 192, 194, 197), and by a class action demanded that the Comptroller be enjoined from paying the fund to the creditors as interest, and that the remaining assets of the bank be returned to the stockholders (R. 84). (If interest is legally payable to the creditors, practically the whole fund will be exhausted—thereby leaving nothing for the stockholders.)

The action below was instituted against both the Comptroller of the Currency (as the title holder of the fund) and the receiver of the bank (as the local agent in charge of the bank's affairs). The Comptroller was served in the District of Columbia, notwithstanding venue in the suit was laid in the District of New Jersey (Title 12 U. S. C. Sec.

110). He appeared specially to challenge the jurisdiction of the United States District Court in New Jersey (R. 58).

The receiver appeared generally and challenged the legal efficacy of the complaint by a motion to dismiss (R. 59).

The District Court sustained the Comptroller's special appearance, holding that this suit was not a proceeding instituted by a national banking association, and therefore was not authorized by Title 12 U. S. C. Sec. 110. *Stein* v. *Delano,* 35 Fed. Supp. 260. In so doing that Court conceded that *O'Connor, Comptroller* v. *Watson,* (5th Circuit), 81 Fed. (2nd) 833 and *Abel* v. *Hellawell,* (2nd Circuit), 25 Fed. Supp. 446, were in conflict with its views (R. 71).

With respect to the meritorious question involved in the receiver's motion to dismiss the complaint, the District Court held that, notwithstanding the general rule in New Jersey, that payment and acceptance of the full principal of a debt discharges any claim for moratory interest, such rule does not apply in the liquidation of a national bank. Creditors of the bank were held to be exceptions to the general rule, and entitled to interest (District Court Opinion, R. 75).

On appeal, the Circuit Court of Appeals for the Third Circuit affirmed the District Court on its dismissal of the complaint, holding, as stated above, that it was unnecessary to decide whether or not the District Court had acquired jurisdiction over the Comptroller (R. 92).

The "National Banking Act," in dealing with the liquidation of national banks, is silent upon the allowance or disallowance of interest to creditors for delay in the payment

of the principal of their claims. *Neither the District Court nor the Circuit Court of Appeals specifically applied New Jersey local law on the question.* Nor did these Courts specifically decide the question independently of any conclusive and binding effect of New Jersey decisions—but with *some* regard for them (*Bd. of Com. of Jackson Co.* v. *U. S.*, 308 U. S. 343); nor did the Courts base their decisions upon their interpretation of a federal statute—the "National Banking Act." For aught, the decision upon the meritorious question seems to have been predicated upon some aspect of Federal common law—a concept which was destroyed by *Erie R. R.* v. *Tompkins*, 304 U. S. 64.

It should be mentioned that on appeal in the Circuit Court, some of the intervening stockholders urged a point not put forward in the District Court. They argued that if any interest were allowed to the depositors, it should not necessarily be computed at the maximum legal rate prevailing in New Jersey. In disposing of this contention, the Circuit Court applied local law, and decided that the rate was at 6% per annum (R. 90-92). The Circuit Court, therefore, is in the anomalous position of deciding two issues in the same case by different approaches. The underlying issue of whether depositors are entitled to *collect any interest*—in view of their acceptance of the full principal of their claims—was decided by the application of some aspect of Federal common law. The incidental issue of the rate of interest was decided by the application of the local law of New Jersey.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was June 30, 1941. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this court to issue the writ of *certiorari* herein prayed for is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (Title 28 U. S. C. Sec. 347).

3. Petitioner claims that under and by virtue of the local law of the State of New Jersey, the stockholders are entitled to the assets of the bank remaining after the payment to and acceptance by creditors of the full principal of their debts. Respondents assert that creditors are entitled to interest for the detention of their principal during liquidation.

4. Petitions for writs of *certiorari* to review decisions of the Circuit Court of Appeals for the Third Circuit which have failed to follow the local law of a state have heretofore been granted by this Court.

Erie R. R. v. *Hilt*, 247 U. S. 97;
Erie R. R. v. *Duplak*, 286 U. S. 440;
Fidelity Union, etc. v. *Field*, 311 U. S. 169;
Klaxon v. *Steutor*, 9 U. S. Law Week 4380, not yet officially reported.

For the allowance of writs directed to other circuits under similar circumstances, see:

Griffin v. *McCoach*, 9 U. S. Law Week 4381, not yet officially reported.

III.

The Questions Presented.

1. Is a class action instituted by stockholders of a national bank on behalf of themselves, all the other stockholders, *and the national bank itself,* to enjoin the Comptroller of the Currency and his Receiver, a proceeding under the "National Banking Act," contemplated by and comprehended within Title 28 U. S. C. 110, so as to confer jurisdiction over the Comptroller, upon the United States District Court in the district where the bank is located—notwithstanding process was served in the District of Columbia?

2. Do creditors (depositors) of a national banking association in liquidation, operating in New Jersey, who accept and acknowledge the receipt of 100% of the principal of their claims, have any right to moratory interest thereon?

3. Should local contract law governing commercial transactions between debtor and creditor apply to the repayment of deposits in the liquidation of a national bank—in the absence of any provision in the "National Banking Act" specifically covering the matter?

4. If local law does not govern the situation described in question No. 3 *as an absolute proposition,* must not the Federal Courts in interpreting the "National Banking Act" have due regard to local law and local institutions, if they do not impinge upon the express provisions of the Act itself?

IV.

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals, in refusing to pass upon the validity of jurisdiction acquired under Title 28 U. S. C. Sec. 110, by the District Court over the Comptroller of the Currency through service upon him in the District of Columbia, leaves the District Court's judgment quashing such service as the prevailing decision in the Third Circuit, which is in conflict with the decision of the Circuit Court of Appeals in the 5th Circuit, (*O'Connor, Comptroller* v. *Watson*, 81 Fed. (2nd) 833). The decision of the 5th Circuit has been followed by the District Court in the Eastern District of New York in the 2nd Circuit, (*Abel* v. *Hellawell*, 25 Fed. Supp. 446).

2. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest notwithstanding their acceptance of the principal of their claims in full, has decided an important question of local law in conflict with applicable local decisions, to wit:

Freeholders v. *Veghte*, 7 N. J. Law Journal 145;
Farmers Mutual Fire Ins. Co. v. *Opdyke*, 32 N. J. Law Journal 112;
Fidelity &c. v. *Wilkes-Barre etc.*, 98 N. J. L. 507; 120 Atl. 734;
Warren &c. v. *Hartford &c.*, 102 N. J. L. 616, 133 Atl. 479.

3. The decision of the Circuit Court of Appeals, in holding that general creditors were entitled to moratory in-

terest after their acknowledged acceptance of the full principal of their claims—if New Jersey local law does not apply—is in conflict with decisions of the Circuit Court of Appeals for the 2nd Circuit, (*Rice* v. *Eisner*, 16 Fed. (2nd) 358; *U. S.* v. *Steinberg*, 100 Fed. (2nd) 124). It is also in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit, (*Nelson, et al.* v. *Chicago, etc., Corp.*, 76 Fed. (2nd) 17 at 22). It is likewise in conflict with a decision of the Circuit Court of Appeals for the Fifth Circuit, (*City of Texarkana* v. *Arkansas-Louisiana Gas Co.*, 118 Fed. (2nd) 289 at 295).

4. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest under the circumstances aforesaid—if New Jersey local law does not apply—has decided an important question of federal law, dealing with the liquidation of national banks under the "National Banking Act", which has not been, but should be settled by this court. The closest approach to this question by this court was a decision rendered in 1876, *National Bank of Commonwealth* v. *Mechanics National Bank*, 94 U. S. 437. In that case, however, the decision was based upon the application of the local law of New York. This nullifies the case as an applicable precedent in the situation at bar, since the local law of New Jersey is different from that of New York with respect to the facts under consideration.

A decision by this court at this time upon the issues raised herein will settle two very important questions, both vital to the public generally, as well as to the Comptroller's office. *Deitrick* v. *Greaney*, 309 U. S. 190. The *first* is whether in the liquidation of national banks, the Comptroller must defend class actions seeking injunctions

against him in the districts where the respective banks are located. The *second* is whether the determination of depositors' rights to moratory interest after payment to and acceptance by them of the full principal of their claims (involving millions of dollars and thousands of depositors in bank liquidations throughout the country) depends upon the direct or indirect application of local law, or upon a federal concept with *some* regard for local law, or upon a strict interpretation of the "National Banking Act" unfettered by local rules or so-called federal common law.

5. The Circuit Court of Appeals, in holding that general creditors were entitled to moratory interest under the circumstances aforesaid—if New Jersey local law does not apply—has decided a federal question in a way probably in conflict with applicable decisions of this court. This statement is consistent with reason No. 4 *supra*, since "applicable decisions of this court", as here used, refers to the rule applied by this court in general debtor-creditor relationships, (*Stewart* v. *Barnes*, 153 U. S. 456; *Girard Trust Co.* v. *U. S.*, 270 U. S. 163; *Board of Com. of Jackson Co.* v. *U. S.*, 308 U. S. 343).

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgments of the United States District Court for the District of New Jersey and the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honor-

able Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated:
July 31, 1941.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with
Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and RODGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

I.

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey in this case is reported in 35 Fed. Supp. 260. The opinion on appeal in the Circuit Court of Appeals for the Third Circuit has not yet been officially reported, but is found in the accompanying record at page 83.

II.

Jurisdiction.

A concise statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, has been given under Heading II in the petition, and in the interest of brevity will not be repeated in the brief.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented, has been given under Heading I of the petition, and in the interest of brevity will not be repeated in the brief.

IV.

Specification of Errors.

The specification of errors is substantially the same as the reasons for the allowance of the writ as set forth under Heading IV of the petition, but, for convenience, may be paraphrased as follows:

1. The Circuit Court of Appeals erred in refusing to sustain jurisdiction of the District Court over the Comptroller of the Currency who was served with process in the

District of Columbia—since such jurisdiction is particularly authorized and recognized under Title 28 U. S. C. Sec. 110.

2. The Circuit Court of Appeals erred in holding that creditors in receiverships are entitled to moratory interest after their acknowledged acceptance of the receipt of the full principal of their claims.

3. The Circuit Court of Appeals erred in substituting its interpretation of the law applicable to the issues before it, and in refusing to follow the local law of New Jersey that moratory interest was not recoverable by a creditor after the acceptance of the full principal of his claim—thus conflicting with Title 28 U. S. C. Sec. 725.

4. The Circuit Court of Appeals erred in refusing to have due regard for the local law of New Jersey, as set out in the third specification, in the determination of depositors' rights emanating from the "National Banking Act"—since the Federal Statute is silent upon the particular issue, and the local New Jersey law does not impinge upon the Federal Statute.

5. The Circuit Court of Appeals erred in refusing to follow the local law of New Jersey, thus conflicting with prior decisions of this Court.

V.

Argument.

Summary of the Argument.

Point I—The interpretation in the case at bar of Title 28 U. S. C. Sec. 110, dealing with jurisdiction over the Comptroller of the Currency is in conflict with the Fifth and Second Circuits.

Point II—The decision of the Circuit Court of Appeals conflicts with the local law of New Jersey, which provides that the receipt by a creditor of the full principal of a debt discharges all liability for moratory interest thereon.

Point III—The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with the Second, Fifth and Eighth Circuits.

Point IV—The legal effect upon the right to collect moratory interest after the acknowledged acceptance of the receipt of the full principal of their claims by depositors of a national bank in liquidation is a matter of paramount public importance involving federal law, which has not been, but should be settled by this Court.

Point V—The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with decisions of this Court—assuming that the law generally applying as between debtor and creditor relationships, applies with equal force to the repayment of creditors' claims in national bank liquidations.

POINT I.

The interpretation in the case at bar of Title 28 U. S. C. Sec. 110, dealing with jurisdiction over the Comptroller of the Currency is in conflict with the interpretation by the Fifth and Second Circuits.

Section 49 of the Judicial Code, (Title 28 U. S. C. Sec. 110) entitled, "Proceedings to Enjoin Comptroller of Currency" provides as follows:

> "All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, *shall be had in the district where such association is located.*"

Notwithstanding the suit below was instituted by petitioner as one of the plaintiffs on behalf of himself, *The New Jersey National Bank and Trust Company of Newark, New Jersey,* and all of the stockholders thereof, to enjoin the Comptroller of the Currency from distributing the monies in his possession as moratory interest to the depositors, the District Court held that such a class action was not comprehended within the provisions of the foregoing section, (R. 70).

The refusal of the Circuit Court of Appeals to pass upon the jurisdictional phase of the District Court's opinion (R. 92) leaves the District Court decision as the prevailing rule in the Third Circuit.

The District Court (R. 71) conceded that its conclusion in respect to the jurisdictional question was at odds with

the rule prevailing in the Fifth Circuit, (*O'Connor, Comptroller* v. *Watson*, 81 Fed. (2nd) 833), and in the Second Circuit, (*Abel, et al.* v. *Hellawell, et al.*, 25 Fed. Supp. 446). Such a conflict in the various circuits ought to be resolved by this Court in order that stockholders of national banking institutions may know definitely whether, in suits instituted by them on behalf of the bank, they can acquire jurisdiction over the Comptroller in the district where the bank is located.

The Comptroller, likewise, ought to know in advance whether he must defend all class actions instituted to enjoin him in the various districts throughout the United States (where the respective banks are located), or whether he may insist that all such actions be instituted in the District of Columbia where he usually resides.

The urgent need of resolving this conflict warrants the allowance of the Writ of *Certiorari* prayed for herein.

POINT II.

The decision of the Circuit Court of Appeals conflicts with the local law of New Jersey, which provides that the receipt by a creditor of the full principal of a debt discharges all liability for moratory interest thereon.

The local law of New Jersey is found in *Freeholders* v. *Veghte*, 7 N. J. Law Journal 145. This decision was rendered in the Somerset County Circuit Court in 1884. The Circuit Court is an intermediate court in New Jersey, but its decision, as rendered in the cited case, has never been re-

versed or modified. This case was followed in *Farmers' Mutual Fire Insurance Company* v. *Opdyke*, 32 N. J. Law Journal, 112, and was cited with approval in *Warren, etc.* v. *Hartford, etc.*, 102 N. J. L. 616, 133 A. 479.

The *Warren* case was decided in 1926 by the highest court of the State of New Jersey—the New Jersey Court of Errors and Appeals.

Inasmuch as the decision of the Circuit Court of Appeals refused to follow the local law of New Jersey as expounded in the foregoing decisions, it is in conflict therewith. Title 28 U. S. C. Sec. 725. Its refusal to apply the local law warrants the allowance of a writ of *certiorari*. *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202; *Rosenthal* v. *New York L. Ins. Co.*, 304 U. S. 263; *New York L. Ins. Co.* v. *Jackson*, 304 U. S. 261; *Fidelity Union Trust, etc.* v. *Field*, 311 U. S. 169; *West* v. *Amer. Tel. & Tel. Co.*, 311 U. S. 223; *Six Cos. of Cal.* v. *Joint Highway Dist.*, 311 U. S. 180.

POINT III.

The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with the Second, Fifth, and Eighth Circuits.

In departing from the general contract rule that the receipt of the full principal of a debt discharges any liability for moratory interest thereon, the decision in the Circuit Court of Appeals is in conflict with the Second Circuit in *Rice* v. *Eisner*, 16 Fed. (2d) 358; *U. S.* v. *Steinberg*, 100 Fed.

(2d) 124; the Fifth Circuit in *City of Texarkana* v. *Arkansas-Louisiana Gas Co.*, 118 Fed. (2d) 289 at 295; and the Eighth Circuit in *Nelson, et al.* v. *Chicago, etc., Corp.*, 76 Fed. (2d) 17 at 22.

Such conflict ought to be resolved, and the allowance of a writ of *certiorari* will accomplish the desired result.

POINT IV.

The legal effect upon the right to collect moratory interest after the acknowledged acceptance of the receipt of the full principal of their claims by depositors of a national bank in liquidation is a matter of paramount public importance involving federal law, which has not been, but should be settled by this Court.

Whether the general debtor-creditor relationship between a bank and a depositor, subsists after a receiver of a national bank has been appointed, is a question which has never been decided by this Court. Admittedly in New Jersey (R. 74), the general rule in debtor and creditor relationships is that the receipt of the full principal of the debt discharges liability for moratory interest thereon.

Query: Does the same rule which applies as between debtor and creditor generally, discharge the liability for moratory interest, after a receiver of a national bank has been appointed, and from time to time pays dividends on account of principal, so that finally all of the principal has been re-paid to the depositor?

This question may appear to have been touched upon in *National Bank* v. *Mechanics National Bank*, 94 U. S. 437,

but examined carefully, the decision in that case was predicated upon the local law of New York, which provided that the allowance of a claim by a receiver was tantamount to a judgment, and since a statute in New York allowed judgments to carry interest, the rule that payment of the principal discharged liability for moratory interest, did not apply.

New Jersey has no similar statute allowing interest on judgments. Accordingly, interest on judgments, as well as interest on claims not reduced to judgment, retain the character of moratory interest. Consequently, the decision in the *National Bank* v. *Mechanics National Bank* case, *(supra)* cannot be said to have disposed of the issue so far as national banks in New Jersey are concerned.

The question is of paramount public importance. The liquidation of national banks recently has resulted in large surpluses over and above the amount necessary to re-pay depositors the full principal of their claims. The issue involved in the case at bar was recognized as being unsettled in *Ticonic National Bank* v. *Sprague,* 303 U. S. 406, where this Court held:

> "As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. *Compare* Stewart *v.* Barnes, 153 U. S. 456, 462, 38 L. ed. 781, 784, 14 S. Ct. 849; United States *v.* North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 S. Ct. 920."

Unless this Court felt that the issue was questionable, it would not have suggested a comparison of the first sentence with the doctrine enunciated in *Stewart* v. *Barnes,*

153 U. S. 456. The latter case is authority for the proposition that payment and acceptance of the principal of a debt discharges liability for moratory interest.

The importance of this public question, affecting as it does, liquidation of banks throughout the country, and the rights of thousands of depositors involving millions of dollars, warrants the allowance of a writ of *certiorari* to once and for all settle the issue.

POINT V.

The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with decisions of this Court—assuming that the law generally applying as between debtor and creditor relationships, applies with equal force to the repayment of creditors' claims in national bank liquidations.

This Court in *Stewart* v. *Barnes*, (*supra*) held that payment of the full principal of an obligation discharges any claim for moratory interest. This same theory was recognized in *Girard Trust Co.* v. *U. S.*, 270 U. S. 163 at 168. The *result* in the latter case, however, differed from the result in the *Stewart* case, due to the fact that an applicable statute in the *Girard* case, specifically provided for the repayment of the obligation with interest. This Court there held that the facts were distinguishable from the *Stewart* case, *but the rationale of the Stewart case was expressly approved.*

Insofar as the reasoning of the Stewart case is applicable to the relationship between depositor and a receiver of a national bank in liquidation, the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, and warrants the issuance of a writ of *certiorari*.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision.

Dated: July 31, 1941.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 358.

EMIL STEIN, *Petitioner*,

v.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR REHEARING.

GEORGE P. BARSE,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR REHEARING.

Comes now Preston Delano, Comptroller of the Currency and Roger E. Brooks, Receiver of the New Jersey National Bank & Trust Company of Newark, New Jersey, the respondents in the above entitled cause and present this their brief in opposition to the petition for rehearing and in support thereof respectfully show:

1. For a statement of the position of the Comptroller of the Currency in opposition to the petition for rehearing we respectfully invite attention to the letter of the Comptroller

of the Currency dated October 25, 1941, to Saul J. Zucker, Esq., attorney for the petitioner. (Appendix p. 4)

2. Petitioner's statements, pages 2, 4 and 5 of the rehearing petition, that distribution of interest to depositors of other insolvent National banks is being withheld or has been withheld pending a final decision in the instant case are based on erroneous information. *Interest dividends in addition to 100% principal have been paid the depositors of the following insolvent National banks by the Comptroller of the Currency since March 2, 1940, the date the complaint was filed in the instant case*:

First National Bank & Trust Company, Fleetwood, Pennsylvania
The National Bank of Bellows Falls, Vermont
The First National Bank of Pender, Nebraska
The First National Bank of Birdsboro, Pennsylvania
The Cumberland National Bank of Fayetteville, North Carolina
The National Bank of Windsor, Vermont
Northeast Savings Bank of Washington, D. C.
The First Inland National Bank, Pendleton, Oregon
The Peckville National Bank, Peckville, Pennsylvania
The First National Bank of Honaker, Virginia
The First National Bank of Paw Paw, Michigan
The County National Bank of Clearfield, Pennsylvania
First National Bank of Saegertown, Pennsylvania
The Bank of Pittsburgh, N. A., Pittsburgh, Pennsylvania.
Farmers & First National Bank of New Castle, Indiana
California National Bank of Sacramento, California
The First National Bank of Marshall County at Plymouth, Indiana
The First National Bank of Burlingame, Kansas
The Essex National Bank of Haverhill, Massachusetts
The First National Bank in Salem, Oregon
The Citizens National Bank of Irwin, Pennsylvania

Because of the prayer for injunctive relief to restrain payment of the dividends in the instant case (R. 54, 55) it was stipulated in the trial court (R. 65), that distributions

of interest to the depositors of this bank would be withheld until this case is finally decided.

3. Certiorari and rehearing were denied by this court in *United States Savings Bank* v. *Morgenthau* (App. D. C. 1936), 85 F. (2nd) 811, cert. den. 299 U. S. 605, rehearing den. 301 U. S. 666, wherein the Appellate Court held (p. 815):

> "It is plain, however, that no part of the assets of the bank may be turned over by the receiver to the stockholders until after both the principal of the debts and the interest thereon are fully paid. In the present case the assets are not sufficient in value to pay both in full, and consequently the stockholders are not entitled to demand a restoration of the bank and its property to them." (Citing Richmond v. Irons, 121 U. S. 27.)

WHEREFORE, it is respectfully urged that the petition for rehearing be denied.

Respectfully submitted,

GEORGE P. BARSE,
Counsel for Respondents.

TREASURY DEPARTMENT
Comptroller of the Currency
Washington.

October 25, 1941.

Saul J. Zucker, Esq.,
744 Broad Street,
Newark, New Jersey.

Dear Sir:

Receipt is acknowledged of your letter of October 22nd referring to the case of *Stein* v. *Delano*, No. 358 in the present term of the Supreme Court of the United States, certiorari denied October 13, 1941, and a rehearing petition proposed to be filed in that court. In this connection you request the following information with reference to incompleted National bank Receiverships wherein it is indicated that all or part of the interest due creditors will be paid in addition to 100 per cent of the principal of the claims:

(1) The name and location of each of such banks
(2) The number of depositors at the date of suspension
(3) The number of stockholders at the date of suspension
(4) The total amount of claims allowed by the respective receivers in each bank liquidation
(5) The amount of money available to depositors or stockholders after the payment of the 100 per cent principal dividend.

As stated in the brief of the appellee filed in this case in the United States Circuit Court of Appeals the Comptroller of the Currency has paid such interest on creditor claims for over 60 years pursuant to the decisions of the Supreme Court of the United States. The appendix to the brief contains a copy of a letter from the Comptroller to a National bank Receiver dated May 18, 1878 evidencing the practice at that time. During this period all or part of the interest due on such claims has been paid in 424 Receiverships as reported to Congress in the various annual reports of the Comptroller of the Currency. Our records indicate that it will be possible to pay interest (over and above 100% principal) in only 17 of the remaining receiverships now open.

If we had before us, instead of behind us, the liquidation of the 441 receiverships (424 plus 17) in which the assets would permit payment of the principal and interest, or if we had any comparatively substantial number of unliquidated receiverships wherein the right to pay interest was seriously questioned and appeared doubtful, it would be in order to consider the desirability or advisability of obtaining a ruling from the Supreme Court. However, it is obvious that such is not the existing situation for, as hereinabove indicated, slightly over 96% of said 441 receiverships capable of paying principal and interest have been liquidated and closed, and interest to the depositors has been paid, in accordance with the long standing position of the office, based upon construction of the National Banking Statutes, in the light of the decisions of the Supreme Court and of the inferior Federal courts. The decision in the Stein case, and the denial of certiorari therein, merely confirms our view that the position hereinbefore taken upon the interest question was sound.

Therefore, it would seem to result that while it cannot be said, with strict accuracy, that the interest question is now moot, it would certainly seem that it is no longer a question of substantial class importance. In the largest of the remaining 17 receiverships above mentioned,—First National Bank-Detroit,—the interest question has been raised, and has been decided by the United States District Court in favor of the depositors, and the fact that an appeal to the United States Circuit Court of Appeals has been taken, does not, in our opinion justify this office in joining with you in asking the Supreme Court to reconsider its denial of certiorari in the Stein case and to grant a review therein, for the purpose of utilizing such decision as might be rendered upon such review as a basis for determining the issues in the Detroit case. Aside from the contingency that it remains to be seen whether the appellant in the Detroit case will carry the appeal to a conclusion, it is our best judgment that the appellate court will affirm the judgment of the trial court in the Detroit case. If, however, the decision in the appellate court in that case should be adverse to the position uniformly taken by other courts in which this question has heretofore been raised, we could consider as to whether we would then apply for a writ of certiorari to the Supreme Court.

As we indicated in our conference with you yesterday, we feel that the shareholders in the Stein case have had their day in court and that we have rendered reasonable cooperation with reference to having the issues fairly presented and determined in the trial court, the appellate court, and in the Supreme Court of the United States.

Accordingly, under the foregoing circumstances, we do not feel that we should in any way participate in asking the Supreme Court to reconsider its decision in denying the writ of certiorari in the Stein case, nor do we feel that we would be justified in expending the considerable time and expense incident thereto, which would be required in preparing the itemized information which you request.

Very truly yours,

R. B. McCandless,
Deputy Comptroller.

Office - Supreme Court, U. S.
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CLERK

IN THE

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No. 358. OCTOBER TERM, 1941.

EMIL STEIN,
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vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

On Petition for Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.
744 Broad Street,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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EMIL STEIN,
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Defendants and Appellees Below.

On Petition for Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

Comes now Emil Stein, the petitioner in the above-entitled cause, and presents this, his petition, for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I.

1. The meritorious federal question in this case is national in scope, and involves the determination of whether local law governing commercial transactions between deb-

tor and creditor is decisive of the issue of whether or not depositors of a national bank in liquidation are entitled to moratory interest after acknowledging the receipt of the full principal of their claims. *

2. That the question of federal law here involved is not confined to the instant case, but is of national importance, is evident from the failure of the Comptroller to oppose the original application for the writ, and from the following statistics, which appear in the Annual Report to Congress of the Comptroller of the Currency covering the year ended October 31, 1940. These relate to the locations of, and the amount of money involved in, national bank liquidations, *final distributions in which, await and depend upon the decision in the case at bar:*

---

* The District Court for the District of New Jersey conceded in so many words that under New Jersey local law, acceptance of the full principal of a debt extinguished the right to thereafter collect moratory interest thereon. Such local law, however, was not applied because the court felt that the liquidation of a national bank created an exception to the general rule. 35 Fed. Supp. 260. The Circuit Court of Appeals affirmed the District Court. 121 Fed. 2nd 975. This Court denied *certiorari* October 13, 1941.

Name of Bank and Location	Amount of Outstanding Cap. Stock Upon Receivership	Am't of Claims Proved and Allowed	Approx. Cash Available as Int. to Depositors, or to be Returned to Stockholders
California Natl. Bank, Sacramento, Cal.	$ 2,000,000	$ 7,412,473	$ 91,727
Natl. Bank of Niles Center, Ill.	100,000	853,380	69,670
1st Natl. Bk. of Marshall Co., Ind.	130,000	726,023	21,113
Essex Natl. Bank, Haverhill, Mass.	1,000,000	2,166,636	30,527
1st Natl. Bank, Detroit, Mich.	25,000,000	335,845,000	23,000,000*
N. J. Natl. Bk. & Tst. Co., Newark, N. J.	2,800,000	5,269,654	425,901
1st Natl. Bk. in Salem, Oregon	200,000	811,884	59,208
Bk. of Pittsburgh Nat. Assoc., Pa.	3,000,000	26,344,806	1,124,270
1st Natl. Bk. of Cannonsburg, Pa.	200,000	1,780,989	174,363
County Natl. Bank, Clearfield, Pa.	500,000	3,044,270	283,830
1st Natl. Bank of Joliet, Ill..	1,040,000	3,269,243	68,167*
TOTALS	$35,970,000	$387,524,358	$25,348,776

* The foregoing statistics are taken from Table No. 68 of the Appendix attached to the Comptroller's Report, and are accurately transcribed with two exceptions:

(a) With respect to the Detroit bank, the report on page 353 shows cash in the comptroller's hand of $30,326,367, but with only an 80% dividend having been paid. On pages 39 and 40 in the body of the report, however, it is stated that provision had been made for the payment of a 20% dividend (thus completing 100% of principal), and that thereafter there would still be a surplus of approximately $23,000,000. On January 22, 1941 the New York Times stated on its financial page that on the preceding day D. C. Schram, receiver of the bank, had announced a $28,000,000 surplus after paying depositors 100% of their claims.

(b) With respect to the Joliet, Ill., bank the report on page 341 shows cash in the comptroller's hands of $133,552, but with only a 98% dividend having been paid. Deducting 2% of $3,269,243 (the amount of the claims allowed) to make up the full 100% still leaves a cash surplus of approximately $68,000.

3. The Comptroller's report, on page 40, is enlightening on the number of depositors involved in the liquidation of only one bank—the 1st Natl. Bank of Detroit. Originally there were 565,845 claimants. As a result of combinations, etc., there were at the date of the report 153,275 claimants exclusive of the owners of 28,900 inactive ac-

counts. If your Honors will consider also the probable number of stockholders of that institution (the figures as to which do not appear in the report), you will have an idea of the number of persons involved in the Detroit liquidation. Again, if your Honors will proportionately reduce the number of depositors and stockholders involved in the other liquidations mentioned in the above schedule—according to the size of the banks—you will have an idea of the number of people whose rights depend upon the outcome of this case. It is probably no exaggeration to say that the interested parties number at least a quarter of a million, stretching clear across the country from California to Massachusetts. According to the above statistics, the case at bar will set a standard for the distribution of at least $25,000,000. Besides, the continued liquidation of the various banks during the past year has probably produced additional cash for distribution.

4. For the reasons set forth under II *infra*, your petitioner did not have the detailed statistics herein set forth at the time the petition for *certiorari* was filed, and consequently was unable to present them to the Court at that time. Likewise it was not therein set forth in detail how desirable, and in fact imperative, it was and is for this Court to authoritatively settle the questions involved herein, so that the rights of so many people will be adjudicated, and a possible multiplicity of suits involving the same question avoided. One such suit has already been started (Par. 9, *infra*).

5. An expression by this Court on the meritorious question herein will have the two-fold effect of (1) settling a question which has perplexed the Comptroller's office to the extent that all liquidations having surpluses have

been held up pending the conclusion of this case (see schedule in par. 2, *supra*), and (2) having the "National Banking Act" clearly interpreted with respect to the payment of moratory interest to depositors in liquidations. At present the "Act" is silent regarding interest (Appendix, Title 12 U. S. C., Sec. 194). A decision upon the merits herein might even lead to Congressional action which would expressly leave the question either to local law or to the federal statute as an attribute of a federal institution. In any event the national scope of the question under consideration cannot be over-emphasized.

II.

6. When the petition for *certiorari* was filed, the full import of the decision of the Circuit Court was not known or realized by petitioner. Petitioner did not then know that there are now pending in the Comptroller's Office, *seventeen* liquidations of National banks in which surpluses have remained after payments to creditors of one hundred per cent of the principal of their claims (at the date of the aforementioned Comptroller's report, there were only eleven such liquidations). Petitioner was under the impression that the within suit was the only one pending involving the question of whether the surpluses belonged to the depositors or stockholders. Petitioner was not aware that the Comptroller was withholding final distributions in all these liquidations, and that he awaited and depended upon the final determination of the within suit.

7. The detailed statistics referred to under "I", *supra*, showing the national importance of the decision in this case

were not set forth in the petition for *certiorari* because petitioner was under the impression that the Comptroller of the Currency intended to and would join in the prayer for the allowance of the writ. Such action would have unequivocally indicated that a decision on the merits in this case would affect not only those persons financially interested in the New Jersey National Bank and Trust Co., but the stockholders and depositors of the other national banks in liquidation all over the country. Petitioner felt that an application for a writ joined in by the Comptroller would of itself have established the paramount importance and national scope of the questions herein to warrant favorable action by this Court.

8. The Comptroller of the Currency has indicated that he is desirous of having this Court pass upon the merits, for in his letter of September 17, 1941 to petitioner's counsel, he says:

> "* * * The question of payment of interest to depositors is an important one that has not been passed on by the Supreme Court in years and, as the record indicates, *we do not oppose a review.*" (Italics ours—Appendix, Ex. II.)

The letters (Appendix, Ex. I and II), petitioner submits, explain the absence from the application for *certiorari* of the detailed information set forth herein. True, the Comptroller doesn't in so many words say that he had agreed to join in the petition for *certiorari*. And it is barely possible, though not probable, that petitioner's counsel may have been unduly optimistic in interpreting the Comptroller's promise of cooperation—admittedly made at the outset of this litigation. Concededly, the Comptroller's office does

"not oppose a review" of the meritorious questions by this Court. And while litigants before this Court cannot stipulate for a writ, they can by their conduct convey to the Court how important they feel the matter really is. It is easy to read between the lines of the Comptroller's letter dated September 17, 1941, that a review by this Court was desired. What other construction can be placed upon his reference to the allowance of a writ in the last national bank receivership case before this Court—in which the Comptroller offered no opposition!

9. The question involving the distribution of surplus between depositors or stockholders is the subject of pending litigation in the Detroit bank liquidation. According to the Comptroller, the District Court in Michigan has decided the issue in favor of the depositors, but the case has been appealed to the Circuit Court of Appeals. (Apparently, the lower court opinion has not yet been reported.) This offers a concrete reason for having the merits reviewed in this case. It will probably settle the question once and for all, and thus avoid a multiplicity of suits. Certainly the expense of repeated litigation involving the same meritorious question would not be warranted if this Court accepted this case, and decided this perplexing issue.

10. The fact that in a number of national bank receiverships interest may have been paid to depositors as the Comptroller's adopted administrative procedure, is not controlling or even persuasive on the issue. Local law, such as obtains in New Jersey, may not have been applicable in any previous liquidation. And a Treasury Department practice previously adopted in 300 cases was rejected by this Court recently because it conflicted with judicial decisions. *Sanford* v. *Com. of Int. Rev.*, 308 U. S. 39 (1939).

III.

11. This Court may have felt that *certiorari* should not have been granted, because the original petition did not sufficiently present the general importance or the national scope of the question. We think that the reasons under "II", *supra,* completely explain this deficiency (if it may be termed that) in the original petition.

12. This Court may also have felt that *certiorari* should have been denied because of the apparent unanimity of result in the cases dealing with the distribution of the surpluses over 100% dividends to depositors. In this connection petitioner desires to point out that in only two cases can it be said that the issue was squarely raised:

> *Nat'l Bk., etc.* vs. *Mechanics Nat'l Bk.,* 94 U. S. 437 (1877);
> *Richmond* v. *Irons,* 121 U. S. 27 (1887).

And while the result in each case was that depositors received the surpluses as moratory interest, that is entirely consistent with petitioner's contentions in this case. In the *Mechanics Nat'l Bk.* case *this Court applied New York local law*—the case came up from New York—which recognized duly allowed claims in receivership matters as tantamount to judgments. And since judgments bore interest in New York, the acceptance of the face amount of the principal as such did not extinguish the right to moratory interest. In the *Richmond* vs. *Irons* case, a similar situation existed. The case came up from Illinois which has a statute providing for interest upon judgments. So, in allowing the

depositors moratory interest, this Court may be said to have again applied local law.

13. *But New Jersey has no statute allowing interest upon judgments.* In New Jersey if a judgment debtor pays the face amount of the principal of a judgment, and it is accepted as such, the creditor may not thereafter claim any moratory interest. That may seem peculiar—but it is New Jersey local law. And if the lower courts had applied New Jersey local law in this case—instead of declaring that the mere liquidation of a national bank created an exception to the general rule—the surplus would have been distributed to the stockholders.

14. The *Mechanics Natl. Bk.* case was decided in 1877, the *Richmond* case in 1887. Needless to say, time has wrought vast changes in the law since 1877—not the least of which has been the decision of *Erie R. R.* vs. *Tompkins,* 304 U. S. 64 (1938). And more and more the Courts are stressing the importance of applying local law, wherever possible, in the federal courts, even to the extent of applying local statutes of limitations to suits upon assessments arising out of national bank liquidations. *Pufahl* v. *Parks,* 299 U. S. 217 (1936); *Rawlings* v. *Ray,* 312 U. S. 96 (1941). Whether the presence of a federal statute, itself indeterminate of the issue in controversy, completely ousts the application of *Erie* v. *Tompkins, supra,* and *Jackson Co.* v. *U. S.,* 308 U. S. 345 (1939) is not only the basic meritorious question at bar, but also a matter of great concern to the bench and bar of the nation. That such a problem begs settlement seems obvious.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the order denying *certiorari* be vacated, and the writ of *certiorari* be allowed.

Respectfully submitted,

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.

Certificate of Counsel.

We, SAUL J. ZUCKER, and LIONEL P. KRISTELLER, counsel for Emil Stein, the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.

APPENDIX.

Exhibit I.

September 15, 1941.

John F. Anderson, Esq.,
Legal Department, Comptroller's Office,
Treasury Bldg., Washington, D. C.

Re: Stein vs. *Delano, etc.*

Dear Mr. Anderson:

I have just been advised by the Clerk of the Supreme Court of the United States that no brief has been filed by the respondents in connection with the application for the allowance of a writ of certiorari in the above matter.

It was my understanding when I met you in Newark at the inception of this litigation, that both sides were to cooperate to the end that the meritorious questions involved in this proceeding would be decided by the Supreme Court. If the plaintiffs were unsuccessful in the Circuit Court of Appeals, they were to make application for the writ, and the Comptroller's office was to join in a prayer for its allowance. I am wondering if this phase of the case has been overlooked by your office.

Will you kindly advise and oblige?

Yours very truly,

SAUL J. ZUCKER,
For the firm.

Z/M.
Special Delivery

Exhibit II.

TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY
WASHINGTON

September 17, 1941

Saul J. Zucker, Esq.,
744 Broad Street,
Newark, New Jersey.

Dear Sir:

While as stated in your letter of September 15, 1941 it was understood during our conversation in Newark that the parties would co-operate to the end that the meritorious questions involved in *Stein* v. *Delano* would be finally determined by the courts, there was no committment by me that the Comptroller or the Receiver would join with the petitioner in seeking a review by the Supreme Court of the United States in the event of a decision by the courts below adverse to the plaintiff. I think we have co-operated fully in the courts below and in the Supreme Court of the United States in that no opposition brief was filed by either the Comptroller or the Receiver. You will note from Mr. Barse's letter to you dated August 19, 1941 that the only question then under consideration was the necessity or desirability of filing a brief in opposition to the petition. The question of payment of interest to depositors is an important one that has not been passed on by the Supreme Court in recent years and, as the record indicates, we do not oppose a review.

Presumably your petition has now been distributed to the Justices of the Supreme Court and their conclusion should be announced on October 13th or October 20th. I can advise you that in the last Receivership case presented to the Supreme Court wherein the Receiver prevailed below

and a review was not opposed by the Comptroller or the Receiver, the review was granted and the case is now on the calendar on the merits, No. 29, this term, *American Surety Company of New York* v. *L. M. Reed, Receiver of the Bethlehem National Bank of Bethlehem, Pennsylvania.*

Yours very truly,

J. F. ANDERSON.

Title 12 U. S. C.

Sec. 194.

DIVIDENDS ON ADJUSTED CLAIMS; Distribution of Assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held (R. S. § 5236).

IN THE

Supreme Court of the United States

No. 358. OCTOBER TERM, 1941.

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

On Petition for Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING, AND PETITION FOR REHEARING.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.
744 Broad Street,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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IN THE

Supreme Court of the United States

No. 358. October Term, 1941.

Emil Stein,
Petitioner and Appellant below,

vs.

Preston Delano, Comptroller of the Currency, and Roger E. Brooks, substituted for E. Lorry Keeton, Receiver of the New Jersey National Bank & Trust Company of Newark, New Jersey,
Defendants and Appellees below.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

Petitioner presents this motion for leave to file the annexed petition for a rehearing of the petition for *certiorari* herein. Since the filing of the petition for *certiorari*, and during the Term at which said application was heard and decided, which Term has not yet expired, there was reported in the September 8, 1941 issue of the Federal Reporter the decision by the Circuit Court of Appeals for the Seventh Circuit in *Garvy* v. *Wilder, et al*, 121 Fed. (2d) 714 (See appendix). That decision creates a direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar on the issue of whether the rule established by *Erie Railroad* v. *Tompkins*, 304 U. S. 64, applies to cases arising out of the "National Banking Act".

The Seventh Circuit applied *local law (Illinois)* on the issue of whether a national bank receiver could collect mor-

atory interest accrued under a stock assessment, after he had accepted full payment of the principal of the assessment.

The Third Circuit applied "*federal law*" on the issue of whether a national bank receiver could pay moratory interest to depositors after they had accepted full payment of principal of their deposits.

The "National Banking Act" does not touch upon this question.

While *Garvy* v. *Wilder* was officially reported before the first petition for rehearing herein was filed, it escaped the attention of petitioner's counsel until November 21, 1941, when reference to it appeared in the "New Jersey Law Journal" (a weekly periodical publishing court calendars and other matters of interest to the bar generally). Petitioner deems the *Garvy* case to be of the utmost importance in the protection of his rights, and since the first petition for rehearing was based on totally unrelated grounds (the national scope of the issues involved), it is submitted that petitioner ought not to be prejudiced for not presenting the within arguments sooner.

WHEREFORE, petitioner respectfully moves that leave be granted to file the annexed petition for rehearing, and for such other further relief as to the Court shall seem just.

Respectfully submitted,

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.

Dated: November 29, 1941.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 358. OCTOBER TERM, 1941.

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

The petitioner, EMIL STEIN, presents this, his second petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

1. His original petition for *certiorari* herein was filed August 7, 1941.

2. On October 13, 1941, this Court denied *certiorari.*

3. On November 4, 1941, a petition for a rehearing, based on other grounds (the national scope of the issues involved) was duly presented, and was denied by this Court on November 10, 1941.

4. The order of this Court, denying *certiorari,* was issued on October 13, 1941, and the term of this Court at which such order was entered has not expired.

5. Your petitioner now seeks a rehearing for the following reasons:

I.

The decision of the Circuit Court of Appeals for the Third Circuit herein is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Garvy* v. *Wilder, et al.,* 121 Fed. (2d) 714.

The right of a receiver of a national bank, after he had accepted payment of the principal of a stock assessment, to collect moratory interest thereon was held in the Seventh Circuit to be governed by the *local law* of the state in which the bank was located, to wit: Illinois; while the right of a receiver of a national bank to pay the depositors moratory interest after they had accepted the full principal of their claims was held in the Third Circuit, in the case at bar, to be governed by *federal law*—unfettered by the applicable local law of the state where the bank carried on its business, to wit: New Jersey.

An analysis of the facts in these two cases shows such a similarity of issues that it is illogical for local law to govern one, and federal law the other.

The case at Bar—Third Circuit, 121 Fed. (2d) 975.

A Receiver was appointed for the New Jersey National Bank & Trust Company on June 11, 1932. Subsequently, the

Comptroller of the Currency levied a 100% stock assessment payable September 12, 1932, as a result of which, stockholders paid over $1,000,000.00 to the receiver. From time to time dividends *on account of the principal* of deposits and other claims were paid until finally, in 1939, the *final* 5% principal dividend (specifically so designated) completed the full 100% of the principal of all claims. There remains a surplus of some $750,000.00 which the Comptroller and Receiver express their intention of paying to depositors as moratory interest.

Petitioner instituted a class action on behalf of all stockholders in the District Court contending that when the depositors unqualifiedly accepted payment in full of the principal of their claims, they could no longer claim or collect moratory interest thereon. This, petitioner urged, and still maintains, is New Jersey local law (established by the cases discussed, *infra*), and should have been applied by the District Court in rendering its decision—especially in the light of *Erie Railroad* v. *Tompkins*, 304 U. S. 64. The District Court applied *federal law*, and dismissed the bill of complaint (Record 66-78; 35 Fed. Supp. 260).

The Circuit Court of Appeals affirmed the decision of the District Court, likewise applying *federal law* (Record 83-93). Paradoxically, having first concluded *without* reference to the local law that the depositors were entitled to moratory interest, notwithstanding the acceptance of the full principal, *the court then applied New Jersey local law in fixing the rate at which interest should be computed.* The crux of the Circuit Court's decision is as follows:

> "The rule as to waiver of interest is equally inapplicable. It does not apply in receiverships for

the reason that during the administration nothing could have been accomplished by a formal demand for interest. Until the principal of all the claims are paid it cannot be known whether the estate would have enough remaining assets to make payment upon the interest. Therefore there can be no waiver of the claim for interest. The writer of the law review article from which we have already quoted summarizes the matter thus:

'Even if it be conceded that the dividends are principal, it should not follow that the obligation for interest is thereby extinguished. The rationale of the general rule in this regard is that when the creditor *voluntarily* accepts the principal as such he ought to be regarded as having waived the interest. In the insolvency cases there is no voluntary acceptance of principal because the creditor is precluded from rejecting the dividends and demanding payment of principal and interest in full.'

HANSON, Effect of Insolvency Proceedings on Creditor's Right to Interest, 32 Michigan Law Review 1069, 1085." (Record, p. 90.)

That the Circuit Court was deciding this vital issue without regard to the law of New Jersey is proved by the reference in its opinion to decisions in Tennessee, California, Maine, and New York, and to annotations, texts, and law review articles. We have no argument with the cited decisions as representing the law of the jurisdictions in which they were rendered. *We are concerned only with the Circuit Court's approach to the issue before it.*

It is submitted that the absence of any reference to New Jersey decisions or local law, coupled with the exhaustive historical and philosophical treatment of "interest" shows that the Circuit Court was applying its *independent judgment* on the issue before it.

We shall now compare the decision of the Third Circuit in the case at bar with *Garvy* v. *Wilder* in the Seventh Circuit.

Garvy v. *Wilder, et al.*—Seventh Circuit 121 Fed. (2d) 714.

The Waukegan, (Illinois) National Bank failed on June 18, 1931. Thereafter a 100% stock assessment was levied by the Comptroller of the Currency payable September 29, 1932. Approximately four years later—August 11, 1936—two stockholders paid in full the principal amount of the stock assessments levied against them, but denied liability for any interest. The receipts which were given to them by the Receiver acknowledged the payment of the full principal of the assessment, but attempted to reserve to the Comptroller the right to collect the interest in the following language: *"Interest on said principal amount of said assessment still remaining due and unpaid."* Suit to collect the interest was instituted in February, 1940.

A number of interesting issues were raised in that suit, but for our purposes, only one need be discussed. It is best stated in the language of the Court at page 717:

> "Rather unsettled, and in dispute, is defendant's contention that payment of the principal extinguished any interest that might otherwise accrue where the obligation for the indebtedness is imposed by state or Federal statute."

In deciding this "unsettled and disputed" issue, the Court felt constrained to follow the rule of *Erie* v. *Tompkins, supra.* It thereupon applied the local law of Illinois,

and reversed its own prior holding which had applied federal law.

> "This Court (7th Circuit) in Graves *v.* Saline County 7 Cir., 104 F. 61, announced the rule which denied the right to recover interest after acceptance of the principal."
>
> "In view of the holding in Erie R. Co. *v.* Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 487, *our decision must now be overruled or limited in its effect to those states where such denial of liability for interest is the law.* For, in Illinois, where this bank was located and where this action was begun, a contrary conclusion has been reached. Feldman *v.* City of Chicago, 363 Ill. 247, 254, 2 N. E. 2d 102; Northwestern Yeast Co. *v.* City of Chicago, 301 Ill. App. 303, 309, 22 N. E. 2d 781." (Italics ours.)

It is submitted that a direct conflict in approach is evidenced by the decisions in the Third Circuit in the case at bar and Seventh Circuit in *Garvy* v. *Wilder, et al., supra.* The basic question to be determined by this Court is, after all, whether the "National Banking Act" eliminates the application of the rule of *Erie v. Tompkins, supra,* in all cases arising out of the "Act."

In the *Garvy* case, the Court was faced with a double issue; first, whether interest ran on stock assessments, and second, whether the payment of the principal of the assessment extinguished the moratory interest thereon. On the former obviously federal issue, the court applied federal law. The latter issue however, the court considered purely local in nature, and followed *Erie* v. *Tompkins, supra.*

In the case at bar, the court was faced only with the second issue of the *Garvy* case. It rejected the doctrine of *Erie* v. *Tompkins, supra,* and exercised its independent judgment.

Do the circumstances of these two cases justify a difference in treatment?

First, the fact that a *receiver* of a national bank was a party in the case at bar could not have been crucial because a receiver of a national bank was a party in the *Garvy* case.

Second, the fact that provisions of the "National Banking Act" were brought in issue, could not have been conclusive because they appeared in both suits. Besides, *Pufahl* v. *Parks,* 299 U. S. 217 and *Rawlings* v. *Ray,* 312 U. S. 96 hold that local statutes of limitations apply to suits brought under the "National Banking Act."

Third, the fact that in the case at bar the meritorious issue was whether the depositors were entitled to interest after acceptance of the principal, while in the Seventh Circuit case it was whether the receiver was entitled to interest under similar circumstances, could not have been decisive, because essentially the question for decision in both cases was identical, namely the collection of moratory interest after the payment in full of the principal indebtedness.

Fourth, the fact that in the case at bar the receiver desires to pay out interest, while in the *Garvy* case he hoped to collect it, is not the basis of a valid distinction. The comparison itself proves the identity of the issues.

Fifth, the fact that in the instant case the principal of the claims was paid out and accepted in the process of

liquidation, while in the *Garvy* case the principal was paid and accepted in satisfaction of a statutory liability, affords no valid distinction because the legal relationship between the bank (or its subsequent receiver) and the depositor on the one hand, and the receiver and the assessed stockholder on the other, is the same—that of debtor and creditor.

Sixth, in neither the Third nor the Seventh Circuit cases could the action of the respective Courts be traceable to a desire to enforce *an express and specific provision of the "National Banking Act"* as in *Awotin* v. *Atlas Exchange Nat'l. Bank,* 295 U. S. 209, and in *Deitrick* v. *Greaney,* 309 U. S. 190. In the *Awotin* case, this Court held that conflicting local law does not excuse the violation by a national bank of a federal statute *expressly* prohibiting national banks from directly or indirectly entering into agreements of guaranty. In the *Deitrick* case, this Court held that conflicting local law does not validate the violation of an *express* provision in the "National Banking Act" prohibiting a national bank from purchasing and holding its own stock. The provisions for the payment of claims (Title 12 U. S. C. 194) and for the imposition of a stock assessment (Title 12 U. S. C. 64) *omit any reference to interest* (See appendix). Hence, there is no necessity for the application of federal law on the ground that local law may conflict with express provisions of the "National Banking Act".

Accordingly, it appears impossible to assign or arrive at any reason why the approach in these two cases should have been different. Petitioner urges that the approach adopted by the Seventh Circuit is the proper one, and in complete harmony with those decisions which have followed

Erie Railroad v. *Tompkins, supra.* But without pursuing the argument on the merits further at this point, the existence of a substantial conflict between circuits should move this court in the exercise of its discretion to grant petitioner's application for *certiorari.*

II.

Under New Jersey local law, a creditor's right to moratory interest is extinguished by his acceptance of the entire principal of the debt—and this rule applies in liquidations as well as in ordinary debtor-creditor relationships.

Petitioner realizes that it would be a work of supererogation for this Court to sustain his contention that the conflict in circuits justifies the allowance of *certiorari,* unless the application of local law would change the result below. By the application below of federal law, the depositors were held to be entitled to interest. Had New Jersey local law been applied, however, a contrary result would have been reached, and the fund in dispute would have been awarded to the stockholders.

In exploring New Jersey local law we start with certain fundamentals:

First, the relationship between a bank and its depositor is as follows:

> "The relation between a bank and its depositor is that of debtor and creditor, * * *." *Harter* v. *Mechanics Nat'l Bank,* 63 N. J. L. 578; 44 Atl. 715.

To the same effect are:

Economy, etc. v. *Fidelity, etc.*, 105 N. J. L. 206, 144 Atl. 30 (1928);
Bd. of Education v. *Nat'l Union Bank*, 121 N. J. L. 177, 1 Atl. (2d) 383, (1938).

Second, there is no statute in New Jersey allowing interest on judgments. Consequently, moratory interest never becomes an integral part of the debt in the sense that it does in jurisdictions having statutes allowing interest on judgments. In New Jersey, interest on a judgment is collected by practice. Recent evidence of this proposition is found in *Simon* v. *N. J. Asphalt, etc. Co.*, 123 N. J. 232 at 234; 8 Atl. (2d) 256, (1939) where the New Jersey Supreme Court said:

> "In our state the practice is to permit the collection of interest on a judgment. Erie Railway Co. *v.* Ackerson, 33 N. J. L. 33."

The *Ackerson* case, decided in 1868 by the same court, specifically based the allowance of interest on a judgment on the common law and not upon a statute, holding:

> "* * *. But, from a very early period, it has been the practice in this state, to collect legal interest on a judgment, by means of an endorsement on the execution, and the right to do this must be regarded as the common law of New Jersey, become so by the same usage that has permitted the Sheriff, with the consent of the plaintiff, to allow the goods levied on to remain in the possession of the defendant for an almost indefinite period."

In New Jersey, therefore, so far as moratory interest is concerned, a judgment is possessed of no greater efficacy than a claim not reduced to judgment.

Third, in simple debtor and creditor relationships in New Jersey, the payment of the principal indebtedness extinguishes the right to moratory interest thereon. There are not many reported cases, but the doctrine is settled.

In *Freeholders* v. *Veghte*, 7 N. J. L. J. 145, (Supreme Court 1884) the question was, whether the County could recover interest upon alleged defalcations of the County Collector after the principal amount of the defalcations had been repaid to the County. The amount misappropriated having been computed, the collector paid the principal indebtedness to the County. A formal resolution, adopted by the Freeholders, had provided that interest was to be computed and added to the principal indebtedness. *The Collector, however, paid only the principal indebtedness.* In dismissing that count of the complaint which sought the recovery of interest on the principal indebtedness for the period during which the funds had been used by the Collector, Justice Magie said:

> "*If interest is recoverable merely as damages for the breach of contract, it is a mere incident to the contract. Upon acceptance of performance of the contract, the right of action for its breach and consequently the right to damages disappears.* (Cases cited.) * * *
>
> My conclusion is that the interest claimed in the original bill of particulars was not the subject of any contract of defendant, but was recoverable only as damages for the wrongful detention of the borrowed money, which he had impliedly contracted to pay. That implied contract has been performed to the satisfaction of plaintiff. No cause of action thereon remains. Upon this claim no recovery can be had.

> It was suggested that plaintiff has no power to discharge defendant from his contract. But the suggestion is not applicable in the view I have taken. *The interest was not due by contract. I can perceive no reason why plaintiff could not accept a performance of the contract made with it although such acceptance practically debars it from damages it might otherwise recover.*" (Italics ours.)

In *Warren, etc.* v. *Hartford, etc.*, 102 N. J. L. 616; 133 Atl. 479, (E. & A. 1926) the question involved was whether a bonding company had to pay interest upon a claimant's demand for payment of work on a municipal job when the principal payment was properly met within ten days after the service of the statutory notice, but considerably after the general contractor was in default to the claimant. Justice Parker, speaking for the New Jersey Court of Errors and Appeals (the court of last resort), in disallowing the interest item, discusses the matter in the following language:

> "In considering this question, we should bear in mind *the fundamental principle of law, often overlooked, that interest is no part of a debt unless so stipulated in the contract;* that, usually, it is of statutory origin, *and is awarded as damages for the detention of a debt.* 33 C. J. 182." This principle is illustrated by such cases as *North Hudson County Railway* v. *Booraem*, 28 N. J. E. 593 (interest on award of commissioners denied to a mortgagee); *Freeholders* v. *Veghte* (Mr. Justice Magie, Somerset Circuit, 7 N. J. L. J. 145; *Anderson* v. *Huff*, 49 N. J. E. 349, 355; *Hill* v. *Aetna Life Ins. Co.*, (Mr. Justice Speer, Hudson Circuit) 39 N. J. L. J. 132, 135; *Hoover Co.* v. *Schaefer Co.*, 90 N. J. E. 515, and *Fidelity Co.* v. *Wilkes-Barre Co.*, 98 N. J. L. 507.

> * * * So, in a foreclosure of a mortgage, the principal and interest stipulated in the bond are totaled as of the date of the master's report, and the decree provides that the premises be sold to pay complainant the sum (reported by the master) with interest from the date of the report, and that out of the proceeds of sale the complainant be paid, 'said debt, interest and costs', *the debt being the amount reported.*" (Italics ours.)

Exhaustive research has disclosed no case in New Jersey distinguishing allowed claims in liquidation proceedings from other debts so far as moratory interest is concerned. We must reason, therefore, by analogy. Since an allowed claim in a receivership has the effect of a judgment, it is treated as such. As a judgment—in the absence of a *statute*—it bears moratory interest, *but only so long as the principal has not been paid.* Once the principal has been accepted, moratory interest as an incident standing alone cannot be collected.

In every reported decision where moratory interest survived the payment of the principal, the indebtedness arose in a jurisdiction where an existing statute allowed interest on judgments, thus making the interest an integral part of the indebtedness, and tantamount to contractual interest. Outstanding examples are:

National Bank v. *Mechanics Nat'l Bank,* 94 U. S. 437 (from New York);
Richmond v. *Irons,* 121 U. S. 27 (from Illinois);
McConnell v. *Park Bank,* 263 S. W. 638 (from Tennessee);
Jones v. *Skinner,* 80 Pac. 2nd 60 (from Oregon);
Greva v. *Rainey,* 41 Pac. 2nd 328 (from California);

Flynn v. *Amer. Bkg. Co.*, 69 Atl. 771 (from Maine);
U. S. Sav. Bank v. *Morgenthau*, 85 Fed. 2nd 811 (from D. C.).

New Jersey may be one of the very few states which does not have a similar statute. That being so, the payment of an allowed claim in receivership proceedings results in the same consequence as the payment of the principal of any other judgment or debt, to wit: the extinguishment of moratory interest. With this statement of the local law of New Jersey, the District Court Judge below was in accord (Record 74).

There is, however, one reported case in New Jersey in liquidation proceedings to which passing reference should be made—*Cumberland Lumber Co.* v. *Clinton Hill Lumber Co.*, 64 N. J. E. 521. In that case before any claims were paid in whole or in part, the receiver applied to the court for an order authorizing him to levy an assessment against stockholders to pay creditors the amounts due them. In permitting interest to be included in the assessment, the Chancery Court said:

> "The claims of creditors, with interest on them, are to be included in the amount to be assessed. As against a stockholder, interest is to be allowed to the same extent as if the action were against the corporation itself, not exceeding, however, the maximum liability of the stockohlders for unpaid stock."

This decision does nothing more than allow moratory interest on a simple debt. It does not concern itself with the question of whether the acceptance by these same creditors of the principal of their claims would have extinguished

their right to moratory interest. The case itself does not affect one way or the other the underlying law of New Jersey that acceptance of the principal of an indebtedness extinguishes the moratory interest.

Had the Third Circuit applied New Jersey local law as enunciated in the foregoing cases, the stockholders instead of the depositors would have been entitled to the surplus remaining after the principal amount of the deposits had been paid in full.

For the foregoing reasons, it is respectfully urged that a writ of *certiorari* directed to the Circuit Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.

Certificate of Counsel.

We, Saul J. Zucker, and Lionel P. Kristeller, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Saul J. Zucker,
Lionel P. Kristeller,
Counsel for Petitioner.

APPENDIX.

Title 12 U. S. C.
Sec. 64.

"INDIVIDUAL LIABILITY OF SHAREHOLDERS; TRANSFER OF SHARES. The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.)" U. S. Code Annotated, Tit. 12.

Title 12 U. S. C.
Sec. 194.

DIVIDENDS ON ADJUSTED CLAIMS; Distribution of Assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been

proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held (R. S. § 5236).

***Garvy, Recr., etc.*, vs. *Wilder, et al.*, 121 Fed. (2d) 714.**

(Italics supplied.)

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; Michael L. Igoe, Judge.

Action by W. J. Garvy, receiver of the Waukegan National Bank, against Josie B. Wilder and another, to collect interest on an assessment made by the Comptroller of Currency against the defendants, who were owners of stock in the Waukegan National Bank, which failed June 18, 1931. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Before EVANS and KERNER, Circuit Judges, and BRIGGLE, District Judge.

This action was brought to collect interest on an assessment made by the Comptroller of Currency against two owners of stock of the Waukegan National Bank, which failed June 18, 1931. The Comptroller levied a one hundred percent assessment payable "by September 29, 1932." The two stockholders paid the face of the assessment, August 11, 1936, but denied liability for interest thereon. The suit was begun in February, 1940, more than five years after the assessment.

When the defendants paid their assessments two receipts were given, alike in all respects, save the amount and number of shares. Herewith is a copy of one receipt:

"Waukegan, Ill. August 11th, 1936

"Received from Josie B. Wilder Three Thousand and no/100 ..... Dollars In full payment of the principal amount of her stock assessment on thirty (30) shares of capital stock of The Waukegan National Bank. *Interest on said principal amount of said assessment still remaining due and unpaid.*

"The Waukegan National Bank
"Melvin B. Ericson, Receiver
"$3,000.00 Per Ellen Yager"

Judgment was entered for the defendants and the complaint was dismissed.

Evans, Circuit Judge.

Plaintiff relies chiefly on Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168. He also asserts that a statutory bank stock liability is contractual in nature and that the Illinois statute provides (R. S. '39, Chap. 74, Sec. 2) for accrual of interest at 5% on liquidation of accounts and that the declaration of an assessment's due date is the equivalent of the settlement of accounts.

Appellees contend that the Federal statutory obligation for a national bank assessment does not draw interest; that no action may be maintained for interest where the principal has been satisfied by payment in full; that the Illinois decisions (in which state this action was brought) do not permit recovery of interest on Illinois bank stockholder's liability; that the interest liability herein, if any existed, is barred by the Illinois statute of limitations. Smith-Hurd Stats. c. 83, § 16.

The National Banking Act, 12 U. S. C. A. § 64, made no mention of interest on bank stockholders' assessments. It provided:

"The stockholders of every national banking association shall be held individually responsible for all * * * debts * * * of such association * * * to the amount of his stock therein, at the par value thereof * * *."

The Illinois decisions hold that there is no liability for interest on stockholders' assessments. Munger *v.* Jacobson, 99 Ill. 349. Also, there is a general rule of law widely accepted, to the effect that a liability created by a statute does not draw interest. Corpus Juris, Vol. 17, p. 823, Sec. 144, states the rule as follows:

"*Actions based on statutes.* Where the right of action is given by statute and the measure of damages is fixed, interest cannot be allowed unless provided for by the statute. So where the damages are in the nature of a penalty fixed by statute without any reference to fault or neglect on the part of defendant, interest should not be allowed."

Notwithstanding this rule and the cases supporting it, we are convinced, and so hold, that, *under the federal authorities, interest liability attaches to national bank stock assessments.* Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168; Bowden *v.* Johnson, 107 U. S. 251, 2 S. Ct. 246, 27 L. Ed. 386; 7 Amer. Juris., Banks § 100.

In Casey *v.* Galli [94 U. S. 677, 24 L. Ed. 168], the court said:

"The defendant demurred to the declaration, and assigned the following causes:— * * *

"4. That the declaration demands a larger sum than the defendant is required by the statute to pay, and also an additional sum by way of interest. * * *

"The sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows

that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation."

In Bowden *v.* Johnson [107 U. S. 251, 2 S. Ct. 256, 27 L. Ed. 386], the court concluded the opinion by stating:

"The liability of the defendant bears interest from the date of said letter, August 13, 1875," citing Casey *v.* Galli.

Liability for interest on a national bank stock assessment must be determined by the decisions of the Federal courts. It is not controlled by state court construction of state statutes which impose a liability on holders of stock in closed insolvent state banks.

Interest liability attaches on the day the assessment was made payable. *Rawlings* v. *Ray, 61 S. Ct. 473, 58 L. Ed.* ——, decided by the Supreme Court February 3, 1941. In this case the cause of action accrued, September 29, 1932.

Two questions are definitely closed by the decision of Rawlings, Receiver *v.* Ray, supra. The first one is that the statute of limitations of Illinois is applicable. Supporting this holding are McDonald *v.* Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437, and McCline *v.* Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. The second question determined the same decision fixes the date when the assessment accrues, as the date fixed by the Comptroller for its payment. The date of maturity of the cause of action is a Federal question. In other words, in this case the cause of action on the assessment accrued, September 29, 1932.

Rather unsettled, and in dispute, is defendants' contention that payment of the principal extinguished any interest that might otherwise accrue where the obligation for the indebtedness is imposed by state or Federal statute.

This court in Graves *v.* Saline County, 7 Cir., 104 F. 61, announced the rule which denied the right to recover interest after acceptance of the principal.

In view of the holding in Erie R. v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, *our decision must now be overruled or limited in its effect to those states where such denial of liability for interest is the law. For, in Illinois, where this bank was located and where this action was begun, a contrary conclusion has been reached.* Feldman *v.* City of Chicago, 363 Ill. 247, 254, 2 N. E. 2d 102; Northwestern Yeast Co. *v.* City of Chicago, 301 Ill. App. 303, 309, 22 N. E. 2d 781.[1]

It is apparent therefore that (a) the assessment drew interest; (b) the collection of interest was not defeated by the payment of the assessment (without interest) in full; and (c) the Statute of Limitations of Illinois governs.

* * * * * *

The judgment is affirmed.

Petition for re-hearing denied.

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[1] See also Blaine *v.* City of Chicago, 366 Ill. 341, 8 N. E. 2d 939.